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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 985

PAUL JONES, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe, etc., *Appellant*,

v.

DEWEY HEALING, Chairman of the Hopi Council of the Hopi Indian Tribe, etc., and ROBERT F. KENNEDY, Attorney General of the United States, on behalf of the United States.

Appeal from the United States District Court for the District of Arizona

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the court below on the merits, less the appendix thereto, is reported at 210 F. Supp. 125. It is filed here under a separate cover marked Appendix A, all of which is hereinafter cited as "Op." Appendix A also includes the appendix to the court's opinion, wherein is set forth a chronological account of the Navajo-Hopi controversy (Op. 107-205); the court's findings of fact and conclusions of law (Op. 207-224); and the judgment (Op. 225-228).

The opinion of the court below dismissing the first defense of the United States, which challenged the jurisdiction of the court on the ground that a political question was involved, is reported at 174 F. Supp. 211.

JURISDICTION

1. This was an action brought pursuant to Section 1 of the Act of July 22, 1958, Pub. L. 85-547, 72 Stat. 403 (*infra*, p. 4).

2. The judgment of the specially constituted three-judge district court (Op. 225-228) was entered on September 28, 1962. The notice of appeal was filed in the district court on November 27, 1962.

3. The jurisdiction of this Court to review the order of the specially constituted three-judge district court is conferred by Section 1 of the Act of July 22, 1958, Pub. L. 85-547, 72 Stat. 403 (*infra*, p. 4).

4. By orders of Judge Walsh of the court below, dated January 16 and March 20, 1963, respectively, the time for docketing the case was extended first to March 27, and then to April 26, 1963.

QUESTIONS PRESENTED

1. By Executive Order dated December 16, 1882, approximately 2,500,000 acres of public land were set apart for the use and occupancy of the Hopi Indian Tribe "and such other Indians as the Secretary of the Interior may see fit to settle thereon." After finding and holding that members of the Navajo Indian Tribe had been settled by the Secretary of the Interior on certain portions of the 1882 Executive Order Area in question, the court below decided that the Navajo Indian Tribe held such lands only as "joint, undivided, and equal" tenants together with the Hopi Indian Tribe.

The first question presented is whether, in view of the terms of the Executive Order (and all of the other circumstances involved); the court erred in holding that the

Navajos, who admittedly were the only Indians falling within the description of "such other Indians as the Secretary of the Interior may see fit to settle thereon," were entitled only to "joint, undivided and equal" tenancy together with the Hopis, or whether, as contended by the Navajos, they were entitled to an exclusive interest in those areas of the 1882 Executive Order Area on which they had been settled by the Secretary of the Interior.

2. The court below found and held that the Navajos were settled by the Secretary of the Interior in 1931 on all portions of the 1882 Executive Order Area not occupied by Hopis. In 1936 and again in 1943, the Secretary of the Interior extended the line of authorized Hopi use and occupancy at the expense of the Navajos, and the court below held that the Hopis were entitled to an exclusive interest in the lands authorized to be occupied by them as those lands had been demarcated by the 1943 boundary.

The second question presented is whether, after the Secretary of the Interior had settled the Navajos on certain lands in 1931, he had authority thereafter, in 1936 and 1943, to unsettle them *pro tanto*.

EXECUTIVE ORDER AND STATUTES INVOLVED

1. The Executive Order of December 16, 1882, is as follows:

> "Executive Mansion,
>
> "December 16, 1882.
>
> "It is hereby ordered that the tract of country, in the territory of Arizona, lying and being within the following described boundaries, viz: beginning on the one hundred and tenth degree of longitude west from Greenwich, at a point 36° 30′ north, thence due west to the one hundred and eleventh degree of longitude west, thence due south to a point of longitude 35° 30′ north; thence due east to the one hundred and tenth degree of longitude west, thence due north to the place of beginning, be and the same is hereby withdrawn

from settlement and sale, and set apart for the use and occupancy of the Moqui, and such other Indians as the Secretary of the Interior may see fit to settle thereon.

"CHESTER A. ARTHUR."

Note: The "Hopi" and "Moqui" are one and the same Indian people. Fdg. 9, Op. 210.

2. The Act of July 22, 1958, Pub. L. 85-547, 72 Stat. 403, is as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That lands described in the Executive order dated December 16, 1882, are hereby declared to be held by the United States in trust for the Hopi Indians and such other Indians, if any, as heretofore have been settled thereon by the Secretary of the Interior pursuant to such Executive order. The Navaho Indian Tribe and the Hopi Indian Tribe, acting through the chairmen of their respective tribal councils for and on behalf of said tribes, including all villages and clans thereof, and on behalf of any Navaho or Hopi Indians claiming an interest in the area set aside by Executive order dated December 16, 1882, and the Attorney General on behalf of the United States, are each hereby authorized to commence or defend in the United States District Court for the District of Arizona an action against each other and any other tribe of Indians claiming any interest in or to the area described in such Executive order for the purpose of determining the rights and interests of said parties in and to said lands and quieting title thereto in the tribes or Indians establishing such claims pursuant to such Executive order as may be just and fair in law and equity. The action shall be heard and determined by a district court of three judges in accordance with the provisions of title 28, United States Code, section 2284, and any party may appeal directly to the Supreme Court from the final determination by such three judge district court.

"SEC. 2. Lands, if any, in which the Navaho Indian Tribe or individual Navaho Indians are determined

by the court to have the exclusive interest shall thereafter be a part of the Navaho Indian Reservation. Lands, if any, in which the Hopi Indian Tribe, including any Hopi village or clan thereof, or individual Hopi Indians are determined by the court to have exclusive interest shall thereafter be a reservation for the Hopi Indian Tribe. The Navaho and Hopi Tribes, respectively, are authorized to sell, buy, or exchange any lands within their reservations, with the approval of the Secretary of the Interior, and any such lands acquired by either tribe through purchase or exchange shall become a part of the reservation of such tribe.

"SEC. 3. Nothing in this Act shall be deemed to be a congressional determination of the merits of the conflicting tribal or individual Indian claims to the lands that are subject to adjudication pursuant to this Act, or to affect the liability of the United States, if any, under litigation now pending before the Indian Claims Commission."

Note: The "Navajo" and the "Navaho" are one and the same Indian people. Fdg. 9, Op. 210.

3. Section 2 of the Act of May 25, 1918, c. 86, 40 Stat. 561, 570, now 25 U.S.C. § 211, provided in pertinent part as follows:

"That hereafter no Indian reservation shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of New Mexico and Arizona, except by Act of Congress."

Section 4 of the Act of March 3, 1927, c. 299, 44 Stat. 1347, now 25 U.S.C. § 398d, provided:

"That hereafter changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress: *Provided*, That this shall not apply to temporary withdrawals by the Secretary of the Interior."

STATEMENT

What follows is a drastic compression of a long opinion—and an even longer record—into simply the essentials necessary to an understanding of the questions raised by this appeal and by the Hopi Tribe's cross-appeal.

The present dispute arises out of the Executive Order of December 16, 882 (*supra*, pp. 3-4), and the tracts of land thereby "set apart for the use and occupancy of the Moqui, and such other Indians as the Secretary of the Interior may see fit to settle thereon."[1] As originally recommended by the Hopi agent in the field, an area of land for the exclusive use of the Hopis was in contemplation (Op. 116-118, 120); the "and such other Indians" clause was added by the Commissioner of Indian Affairs in Washington before submission to and signature by the President (Op. 118).

In 1882, when what is hereinafter referred to throughout as "the Executive Order Area" or "the 1882 Executive Order Area" was created, there were living thereon about 1800 Hopis and about 300 Navajos (Op. 117-118). In 1958, when the present jurisdictional act (*supra*, pp. 3-4) was passed, the population figures were about 3200 Hopis and about 8800 Navajos (Op. 205).

In the period just following 1882, the Indian Office invoked military force to expel the Navajos from that portion of the Executive Order Area used and occupied by the Hopis (Op. 123-129). Actually, although troops were called out in 1888 and in 1890 (Op. 123-126, 128-129), the Army opposed the removal of the Navajos who were settled within the Executive Order Area, not only because of hardship to them in winter, but in any event not unless

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[1] We refer again to the District Court's Finding of Fact No. 9 (Op. 210): "The words 'Navajo' and 'Navaho' refer to one and the same Indian people. The words 'Moqui' and 'Hopi' refer to one and the same Indian people."

and until a line of separation was established between the Hopis and the Navajos to settle for the future the respective lands to be used and occupied by the members of each tribe (Op. 124-126, 128-130). In fact, no Navajos were ever forcibly removed by the military (Op. 125-126). Moreover, at no time did any of the Army's efforts contemplate expulsion of Navajos from the entire 1882 Executive Order Area, but only from the limited portion thereof used and occupied by the Hopis (Op. 123-130). The last instance of War Department participation in the Navajo-Hopi problem was in early 1891, when representatives of the Army and of the Indian Office joined in establishing the Keam-Parker line of demarcation, viz., a circle with a 16-mile radius from the central Hopi village of Mishongnovi (Op. 130). Both tribes accepted the Keam-Parker line, and some 150 Navajo hogans (Navajo residences made of logs and earth) within that line were abandoned as the Navajos moved out in compliance with this agreement (Op. 130-131).

Thereafter, over a period of many years, members of both tribes lived in the 1882 Executive Order Area (Op. 117 *et seq.*). The last suggestions emanating from the Indian Office that any of the Navajos living there were trespassers came in 1899 and 1900 (Op. 135, 136). Beginning in 1894, and continuing to the present time, children of Navajo families that were settled in widely scattered places of residence within the 1882 Executive Order Area outside the places of actual Hopi use and occupancy were enrolled and taught in schools established for them in that Area by the Department of the Interior and paid for out of Congressional appropriations, at places such as Pinyon, Smoke Signal, White Cone, Sand Springs, Denebito, and Red Lake (Op. 135, 136, 152, 169, 177, 201, 205).

And, beginning in 1893, there were repeatedly affirmed instances of official recognition, both by Indian Office representatives as well as by members of Congress, that both tribes had rights in the 1882 Executive Order Area (Op. 132-133, 138, 141, 143, 146, 147, 150-151, 153). In

1893 attempts were made to allot lands therein to individuals, but this plan was abandoned in the face of Hopi preference for communal ownership (Op. 134). In 1909 there was a second effort to allot lands to each Indian residing in the Executive Order Area, irrespective of whether the allottee was a Hopi or a Navajo (Op. 138), but this program was abandoned in 1911 (Op. 139-140).

Following the failure of the second allotment program, the Indian Office took steps to terminate the Navajo-Hopi controversy by identifying and determining the areas of exclusive use and occupancy of the Navajos and the Hopis within the Executive Order Area (Op. 141-159). The first substantial effort in that direction came in 1930-1932, culminating in the first report of H. G. Hagerman, a former Governor of New Mexico whom the Secretary of the Interior had appointed Special Commissioner to Negotiate with the Indians (Op. 158).

This first Hagerman report laid down lines of separation between the Navajos and the Hopis; it assigned 438,000 acres to the Hopis, this area to include "practically all, if not more than all, the land which has been within the memory of living man used by the Hopi Indians for grazing purposes in this vicinity" (Op. 158-162). A general description of the area was submitted, subject to detailed reconnaissance of the terrain to find the best location for the boundary fence (Op. 45).

On February 7, 1931, the Commissioner of Indian Affairs and the Secretary of the Interior agreed to and approved the Hagerman proposal to segregate the two tribes, and to establish the boundaries therein recommended to be surveyed and fenced (Op. 44-45, 162). By their acceptance of the Hagerman proposal, the Commissioner and Secretary recognized the rights of Navajos in the 1882 Executive Order Area and set aside a large part of that Area for their exclusive use (Op. 46); in the view of the court below, this recognition "is explainable

on no other basis than that the Secretary, impliedly exercising the authority reserved to him in the executive order, was then and there settling in the 1882 reservation all Navajos then residing in that reservation."

On January 1, 1932, Governor Hagerman submitted to the Commissioner of Indian Affairs a comprehensive second report of his activities as Special Commissioner and advised further in respect of the boundaries of the Navajo reservation. So far as the Executive Order Area was concerned, Hagerman recognized that the Hopis "range out for some distance" from the mesa villages but "occupy only a small portion of the whole so-called Hopi Reservation." He said that "the whole area is considered and treated as a part of the Navajo Reservation." He specifically described the area which he believed should be set aside for the Hopis as "embracing approximately 500,000 acres," the boundaries being in accord with those suggested in his first report in 1930 as being "fair and just to both Hopis and Navajos." (Op. 163.)

However, in proposing bills to Congress which would have adopted and confirmed the areas of exclusive use and occupancy by the Hopis and the Navajos respectively as set forth in the Hagerman reports, the Indian Office yielded to Hopi opposition, and the resultant Act of June 14, 1934 (c. 521, 48 Stat. 960), which fixed the boundaries of the Navajo reservation in Arizona, avoided the long-standing controversy between the two tribes by simply providing that nothing therein would affect the existing status of the 1882 Executive Order Area. The ultimate fate of that Area was thus left to another day. (Op. 165-168.)

Navajo settlement in those portions of the 1882 Executive Order Area designated by the Hagerman report having been confirmed and established by authority of the Secretary of the Interior (Op. 48, 49), the Bureau of Indian Affairs faced the administrative problem of

managing the two tribes in their respective areas. In 1936 the Commissioner of Indian Affairs effected a temporary segregation of the two tribes—specifically reserving, however, the ultimate title—by establishing Land Management District No. 6. This was reserved for the Hopis, while the balance of the 1882 Executive Order Area was divided into Land Management Districts Nos. 1, 2, 3, 4, 5 and 7 for use of the Navajos (Op. 170-177). The Hopis were given the conditional right to go outside of District No. 6 to gather firewood in the wooded portions of the 1882 Executive Order Area, but only under the same permit system as the Navajos (Op. 179-180). In all other administrative respects, all of the 1882 Executive Order Area outside of Land Management District No. 6 was treated as part of the Navajo Reservation (Op. 177-181).

With respect to the boundaries of Land Management District No. 6, the Hopis continued to disagree and to protest; once again the Indian Office sought to meet their complaints (Op. 171-181). The so-called Rachford Committee was in consequence appointed late in 1939, with a view to reexamining the Hagerman boundaries (Op. 182). But, when the draft of an order to effectuate Rachford's seven recommendations as modified by agreement between the Hopi and Navajo superintendents (Op. 184-185) was presented to the Secretary (Op. 185-186), it was disapproved by the Solicitor of the Department on February 12, 1941 (Op. 55, 186), on the ground that (1) it was contrary to the prohibitions against the creation of Indian reservations without statutory authority (Sec. 2 of the Act of May 25, 1918, c. 86, 40 Stat. 561, 570, 25 U.S.C. § 211, *supra*, p. 5; Sec. 4 of the Act of March 3, 1927, c. 299, 44 Stat. 1347, 25 U.S.C. § 398d, *supra*, p. 5); (2) it was in violation of the right of the Hopis within the 1882 reservation; and (3) it was not in conformity with the provisions of the Hopi constitution approved

December 19, 1936, pursuant to the Indian Reorganization Act of June 18, 1934 as amended (25 U.S.C. §§ 476-479).

The Solicitor's opinion of February 12, 1941, does not appear to have been submitted to the Secretary of the Interior, and was not approved either by the Secretary or by any Assistant Secretary (Def. 861),[2] as is regularly done in the case of Solicitor's Opinions published in the *Land Decisions* (L.D.) and *Interior Decisions* (I.D.) series.

None the less, the opinion of the Solicitor was regarded as controlling by the administrative officers in the Department, who then undertook a further effort to satisfy the criteria of the Solicitor's opinion by appointing W. R. Centerwall, Associate Regional Forester, U. S. Forest Service, Department of Agriculture, again to revise the boundary line of Land Management District No. 6 (Op. 190-195). The Centerwall report, written in only three months, became effective in 1943 (Op. 190-195). It added 131,946 acres to the Hopis' Land Management District No. 6 (Op. 193-194).

In consequence of the implementation of the hastily-prepared Centerwall report, as the court below wrote (Op. 61-62, 195), "Many Navajo families, probably more than one hundred, then living within the extended part of district 6, were required to move outside the new boundaries and severe hardships were undoubtedly experienced by some."

The record reflects further administrative efforts to determine the rights of the two tribes and of the individuals composing them in and to the 1882 Executive Order Area, its minerals as well as its surface (Op. 192-205). But every such effort broke down over the Department of the

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[2] As in the case of the appendix to the opinion below, the narrative account of the controversy (Op. 109 *et seq.*), this refers to the page of the bound books of documentary exhibits introduced by the defendant Navajos.

Interior's fear or reluctance to fix the respective rights of the Navajos and the Hopis within the 1882 Executive Order Area (*ibid.*). Finally, recognizing that the long-standing dispute transcended administrative solution, Congress passed the Act of July 22, 1958 (*supra*, pp. 4-5), which submitted the entire controversy to judicial determination.

The present case was duly brought pursuant to the enabling act (Op. 4-7). A motion on the part of the United States to dismiss the proceeding on the ground that it involved political rather than justiciable questions was denied. *Healing* v. *Jones*, 174 F. Supp. 211. Thereafter the case proceeded to trial on the merits.

The three-judge district court held that, while in its view the Navajos had no rights in the 1882 Executive Order Area either originally or for many years thereafter, they were settled thereon by the Secretary of the Interior when he approved the first Hagerman report in 1931 (Op. 8-68); that the Solicitor of the Department was correct in 1941 in holding that Congress had prohibited the creation of Indian reservations except by Act of Congress and therefore prohibited in this case any segregation of the two tribes as then proposed (Op. 55, 84-90); that all of the Navajos on the 1882 Executive Order Area in 1958 had been settled thereon by the Secretary of the Interior, either impliedly or expressly, and that such settlement inured to the benefit of the Navajo Indian Tribe (Op. 67-68); that the Hopis were entitled to the exclusive right and interest, both as to surface and subsurface, to that part of the 1882 Executive Order Area lying within district No. 6 as redefined in 1943 (Op. 73-74); and that the Navajos are entitled, in the balance of the 1882 Executive Order Area, only to "joint, undivided and equal rights and interests both as to the surface and subsurface" together with the Hopis (Op. 90-105).

A map showing the 1882 Executive Order Area, the area conceded by the Navajos to belong to the Hopis, and the

boundaries of District 6 as fixed in 1936 and extended in 1943 appears facing Op. 8.

Both sides appealed from the judgment entered on the opinion (Op. 225-228).

The Hopis asserted in substance that no Navajo had any rights in the 1882 Executive Order Area.

The Navajos asserted that they were entitled to an exclusive interest in those non-Hopi portions of the Executive Order Area where they had been settled by the Secretary; that the creation of a joint, undivided interest in both tribes outside of the area of exclusive Hopi use and occupancy was completely contrary both to the purpose and the language of the jurisdictional act; and that the Secretary of the Interior had no power to unsettle any Navajos once settled by him, so as to push them back thereafter, as was done in 1936 and again, far more drastically, in 1943.

The United States, which appeared simply as stakeholder once its motion to dismiss was overruled, did not appeal.

THE QUESTIONS ARE SUBSTANTIAL

Only a few Terms back, this Court, following an unbroken line of decisions that commenced with Chief Justice Marshall's celebrated opinion in *Worcester* v. *Georgia*, 6 Pet. 515, reaffirmed the quasi-sovereign status of the Navajo Tribe of Indians, a status that, except as Congress may have otherwise directed, immunized it and its members from State control over or interference in their relationships. *Williams* v. *Lee*, 358 U.S. 217. The present appeal, which involves a contest between two Indian nations, is therefore as momentous and significant a confrontation of sovereigns as any suit between States of the Union, the latter being a class of controversy committed by Section 2 of Article III of the Constitution to the original jurisdiction of this Court.

Section 1 of the enabling Act of July 22, 1958 (*supra*, p. 4), recognizing that the present controversy was "the greatest title problem of the West" (Op. 2), provided that the action which was thereby authorized to be brought "shall be heard and determined by a district court of three judges in accordance with the provisions of title 28, United States Code, section 2284," and provided further that "any party may appeal directly to the Supreme Court from the final determination by such three judge district court."

Inasmuch as the determinations of three-judge district courts in the normal classes of cases heard by such tribunals come here by appeal rather than by certiorari, cf. 28 U.S.C. § 1353, we think that the words "may appeal directly to the Supreme Court" in the statute can not be read simply as authorizing discretionary review by certiorari. Cf. *Colgate* v. *United States*, 280 U.S. 43; *United States* v. *Goltra*, 312 U.S. 203, 204 n. 1. Here Congress without question intended review by appeal in its precise technical sense.[3] And we think that a reading of the committee reports on the enabling legislation (Sen. Rep. 265, 85th Cong., 1st sess., Appendix B, *infra*, pp. A2-A10; H.R. Rep. 1942, 85th Cong., 2d sess., Appendix C, *infra*, pp. A11-A19) makes it evident that Congress anticipated that a controversy of the present magnitude and duration—a contest 75 years or so old when the Act of July 22, 1958, was passed, and now one that has continued for over 80 years—should ultimately be determined by the highest court in the land, after plenary hearing.

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[3] In the sole instances of which we are aware in which Congress has provided for review by certiorari of the judgments of three-judge district courts, the statute expressly provided that "Any final order or decree of the special court may be reviewed by the Supreme Court of the United States upon application for certiorari • • •." Sec. 745 of the Act of July 28, 1939, c. 393, 53 Stat. 1134, 1141; Sec. 745 of the Act of Oct. 16, 1942, c. 610, 56 Stat. 787, 795.

Even apart from the committee reports, we submit that the stature of the parties, the length of time that the dispute between them has subsisted, and the weight of the interests involved, combine to demonstrate the need for a full hearing in this Court, with briefs on the merits, and with oral arguments in which both tribes may have their say. For this, after all, is not a motor carrier case or a local dispute over freight rates, such as would be appropriate for disposition by memorandum affirmance.

Here it is vital, not only that justice be done, but that justice appear to be done. The two Indian nations concerned, whose conflicting claims in and to the 1882 Executive Order Area are now at last to be resolved, will in fact never feel satisfied until and unless this Court has heard them out; nor could they be. No matter what the ultimate decision, the animosities engendered by more than three-quarters of a century of controversy will be long in dying; lost causes have an unhappy faculty for becoming etched in community memory. But the only hope that the bitterness so long kept alive will ever be allayed lies in full consideration of both tribes' contentions by this Court. Only then, only after the Supreme Court of the United States has fully and deliberately pondered the respective contentions of Navajos and Hopis, will it ever be possible for the present long-festering dispute to fade into history.

The present appeal and that of the Hopis present three questions.

First. In holding that, with respect to the portions of the 1882 Executive Order Area not awarded to the Hopis, the Navajos were entitled only to "joint, undivided and equal rights and interests" with the Hopis, the court below committed egregious error. For that holding, which rests on an obvious misreading of the Executive Order and on a demonstrably inadmissible construction of two statutes, frustrates the will of Congress that there should be a

partition of the Executive Order Area between the two tribes. Moreover, by providing for joint tenancy of the larger part of the 1882 Executive Order Area between the contestants, that holding not only perpetuates the existing controversy between them, but introduces new, grave, and perhaps insuperable administrative difficulties with respect to any exploitation of the underlying mineral rights for the benefit of the Indians, as well as with respect to any regulation of surface use.

We say, "an obvious misreading of the Executive Order," because the court below has thereby perverted that order's operative words, "for the use and occupancy of the Moqui, and such other Indians as the Secretary of the Interior may see fit to settle thereon." Surely those clauses cannot mean that the Hopis are to have exclusive rights in all of their part of the reservation, while any other Indians settled thereon are to be given only a tenancy in common with the Hopis, even in areas where no Hopi has ever lived. Bearing in mind that the President did not establish the 1882 Executive Order Area exclusively for the Hopis, as indeed was originally recommended from the field (Op. 116-118), it cannot for a minute be supposed that all other Indians later settled on the Area by the Secretary under the authority of the Executive Order were simply to share their portions with the Hopis on the Hopi footing that "what is Hopi is mine, what is not Hopi is also mine." Yet that refusal to give full effect to the Executive Order as written, that insistence on the terms of the Order as originally recommended but never thus adopted, that stubborn assertion that the entire reservation belonged only to the Hopis—that Hopi fixation, as we think it may accurately be termed—has found its way into the judgment now sought to be reviewed.

We think it clear that, to the extent that the Secretary of the Interior settled other Indians on the 1882 Executive Order Area, those others were intended to have, and did

have, under the Executive Order and under the 1958 Act, just as exclusive rights to their portions as the Hopis had to theirs. The very terms of the Executive Order make it clear the Hopis' rights were always subject to defeasance once the Secretary settled other Indians on the lands thereby reserved. In technical terms, the other Indians settled by the Secretary in the Executive Order Area had an executory interest, which cut off the Hopis' theretofore vested rights once the condition of settlement by the Secretary happened. See 1 Casner, ed., *American Law of Property* (1952), §§ 4.53, 4.55. That being so, there is no basis for the holding that, since the Hopis never abandoned any rights in the portions never occupied by them (Op. 90-99), they never lost an undivided interest in those unoccupied portions. For the Secretary's authority to settle non-Hopis on the 1882 reservation rested on the Executive Order and was therefore in no sense conditioned on any consent by the Hopis.

Indeed, the Hopis themselves recognized this when they adopted their Constitution in October 1936; Article I of that document provided as follows (Op. 171):

> "Article I — Jurisdiction. The authority of the Tribe under this Constitution shall cover the Hopi villages and such land as shall be determined by the Hopi Tribal Council in agreement with the United States Government and the Navajo Tribe, and such lands as may be added thereto in future. The Hopi Tribal Council is hereby authorized to negotiate with the proper officials to reach such agreement, and to accept it by a majority vote."

The court below also went badly astray, in this respect following the Solicitor in 1941, by holding that the Secretary had no power to divide the 1882 Executive Order Area between the two tribes occupying it, this because of supposed prohibitions enacted by Congress in 1918 and 1927.

In 1918, in a paragraph of the Indian Appropriation Act for F. Y. 1919, Congress declared (Sec. 2 of the Act of May 25, 1918, *supra*, p. 5):

> "That hereafter no Indian reservation shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of New Mexico and Arizona, except by Act of Congress."

And in 1927, in providing for the leasing of oil and gas underlying Indian reservations, Congress provided (Sec. 4 of the Act of Mar. 3, 1927, *supra*, p. 5:

> "That hereafter changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress: *Provided*, That this shall not apply to temporary withdrawals by the Secretary of the Interior."

What the Solicitor failed to realize in 1941, what the court below failed to realize in 1962, was that these provisions were intended, and were intended only, to prevent further withdrawals of public lands otherwise available for entry and acquisition by non-Indians, and to prevent as well the consequent removal of such withdrawn lands from the tax rolls of the States. The 1918 act was directed at withdrawals involving the creation of new Indian reservations, the 1927 provision at withdrawals that involved the enlargement of existing Indian reservations.

Neither statute had anything whatever to do with the partition of an existing reservation or executive order area between two or more tribes then residing thereon, for the obvious reason that no such partition could diminish in any way either the public lands still available for entry, or remove from taxation lands then subject to the taxing power of the States and their political subdivisions. All this appears clearly and unequivocally from the legislative

history of the two measures concerned, the pertinent portions of which we set forth in the margin.[4]

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[4] (a) *1918 Act.* The proviso in question was the last paragraph of § 2 of the Indian Appropriation Act, F.Y. 1919, originally introduced as H.R. 8696, 65th Cong., 2d sess. It was not part of the bill as originally reported to either house (H.R. Rep. 240, S. Rep. 272, both 65th Cong., 2d sess.), but was offered as an amendment on the Senate floor by Senator Smith of Arizona (56 Cong. Rec. 4194-4195), who said in pertinent part at p. 4194:

"Any one who will look at conditions in that State [Arizona] and at the map will know, I think, before any more public land is taken away from the people who have got to meet conditions subsequent to this war, when the Indians are so amply provided for, that it would be an outrage on the people, not only of that State, but upon all who are interested in the public lands of the United States.

"• • • There has been taken from that State nearly half of the best land in the State. • • •

"I sincerely hope that the Senate will maintain its dignity by saying that no more public lands of the United States, which will be badly needed bye and bye, shall be carried out of the possession of the people of the United States by mere Executive Order.

"• • • The amendment • • • proposes to retain what Congress ought always to have kept—the right of disposition of the public lands."

Senator Shafroth of Colorado supported the amendment, saying (56 Cong. Rec. 4195):

"We in the West have had a large and unfortunate experience relative to the withdrawal of lands from entry. • • • The creation of a reserve deprives a State of the right to tax the land within its borders and is an interference with the rights of the State. It is an outrage that millions of acres of land in a sovereign State of this Union should be set aside and forever held without the right of taxation by the State. • • •

"Mr. President, it seems to me that if there is no provision of law prohibiting the setting aside of Indian reservations that we ought to adopt such a provision now and have it in force as quickly as possible, so that the rights of the States may be protected against the encroachments of the Federal Government in that respect."

The amendment was adopted on a voice vote (56 Cong. Rec. 4195).

(b) *1927 Act.* This was originally Sec. 4 of S. 1240, 69th Cong., 2d sess.; in this instance the Committee reports are quite clear

As has been seen, the Solicitor of the Interior ruled in 1941 that any partition of the 1882 Executive Order Area between the Navajos and the Hopis would constitute the creation of a new Indian reservation in violation of the 1918 and 1927 Acts (Op. 186). One of the Indian Office officials later characterized that ruling as "a fine example of the working of the legalistic mind at its worst" (Op. 192). But the 1941 opinion was worse than merely rigidly conceptualistic; it was plainly wrong. For neither the Solicitor, nor any one in the Interior Department after him, nor ever the court below, ever troubled to examine the legislative history of the 1918 and 1927 provisions, history that demonstrated with virtually mathematical precision that those enactments were directed only at further withdrawals from the public domain and the consequent reduction of taxable lands thereupon ensuing, and that demonstrated further that neither law had the slightest bearing on the power of the Secretary to deal with an existing Executive Order Area, already "withdrawn from settlement and sale" (*supra*, pp. 3-4) and hence not subject to State taxation, or on his power to divide it among the several Indian tribes for whom that Executive Order Area had originally been set aside.

In consequence of this inadequate, indeed even slapdash, examination of the statutes on which decision was rested, in consequence of this failure to utilize the obvious, elementary, and fundamental process of examining legislative history as a guide to statutory meaning, the present controversy continued unabated for 20 years more after the Solicitor's 1941 opinion, with the further consequence

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(S. Rep. 1240, 69th Cong., 2d sess., pp. 3-4; H.R. Rep. 1791, 69th Cong., 2d sess., on the cognate bill, H.R. 15021, p. 4):

"Since Congress has by the act of June 30, 1919 (41 Stat. 3, 34 [now 43 U.S.C. § 150]) forbidden the further creation of Executive order reservations, except by act of Congress, section 4 of the proposed bill provides that no changes shall be made in the boundaries of existing Executive order reservations except by act of Congress."

that, at the present juncture, the purpose of the enabling act has been effectually nullified by the ruling below.

Congress in 1958 directed that the 1882 Executive Order Area be divided, so that the controversy between the two tribes might be laid to rest; see the Committee reports in Appendices B and C, *infra*, pp. A2-A19. Instead, the judgment below, which provides that the greater portion of the Executive Order Area is now to be held in joint tenancy, defeats that purpose, continues the controversy by extending Hopi rights into portions where no Hopi ever enjoyed use and occupancy from the dawn of recorded history, and thus renders difficult if not impossible the development of both the underlying minerals and the grazing surfaces for the benefit of the Indians concerned.

The claim of the Navajos to an exclusive interest in those portions of the 1882 Executive Order Area in which they had been settled follows, we submit, both from the Executive Order of 1882 as well as from the enabling Act of 1958, and clearly qualifies as a substantial question of law calling for resolution by this Court.

Second. More than that, the Navajos contend that the boundary between the area in which they are entitled to an exclusive interest and that in which the Hopis have a similar exclusive interest is properly to be drawn between the lands occupied by the Hopis over the decades and these on which the Navajos had been settled by the Secretary. This was the boundary recommended by both Hagerman reports (Op. 161-164). Thereafter, having once settled the Navajos, the Secretary had exhausted the powers conferred on him by the 1882 Executive Order, which did not even by implication authorize him either to resettle or unsettle any Indians he had once settled. As the court below said of earlier action looking to remove Navajos from the 1882 Executive Order Area (Op. 31), "They could not have been removed if they had been settled in the reservation by Secretarial authority." By

the same token, they could not properly be removed from one portion of the reservation to another. And the record plainly shows that, when the boundaries of District 6 were extended for the Hopis' benefit in 1943, numerous Navajo families were heartlessly uprooted (Op. 61-62, 195).

The two Hagerman reports gave the Hopis all they had ever had, and more; the actions thereafter taken deprived the Navajos of areas on which the Secretary had already settled them pursuant to the authority granted him by the 1882 Executive Order. The rejection of the second Hagerman report in the Department, the later actions by the Indian Office, and the ruling below, severally rest on the misreadings and misconceptions already discussed above under *First*. It is accordingly sufficient simply to say here that, once the basic underlying principles of law are correctly applied, the adjustment of the boundary as now claimed by the Navajos then flows naturally therefrom.

Third. The Hopis have also appealed, on three grounds; we shall copy those grounds as they appear in the Hopi notice of appeal, and show under each why it is not well taken.

1. "Did the Secretary of the Interior have authority to settle the Navajo Indian Tribe upon the Hopi Executive Order Reservation after enactment of the Act of May 25, 1918, * * * or the Act of March 3, 1927 * * *?"

We pass the obvious point that a reservation for "the use and occupancy of the Moqui, and such other Indians as the Secretary of the Interior may see fit to settle thereon" cannot either fairly or accurately be called the "Hopi Executive Order Reservation," even as a form of administrative shorthand — except possibly by way of illustrating what we have already diagnosed as the Hopi fixation. The short answer to the Hopis' first point is that, as has been demonstrated above at pp. 18-20, the cited

statutes simply prohibited further withdrawals from the public domain, with consequent losses of state revenues; the statutes cited by the Hopis did not in any respect limit or even seek to qualify the Secretary's authority within any Indian reservation or Executive Order Area that was already withdrawn from public settlement.

2. "Can the Navajo Indian Tribe or individual Navajo Indians share in the benefits of both the Navajo Indian Reservation and the Hopi Executive Order Reservation?"

When the Navajos are assigned exclusive rights in that portion of the 1882 Executive Order Area properly theirs under the law and facts in this case, those lands, under the specific language of Section 2 of the 1958 enabling act (*supra*, p. 5), "shall thereafter be a part of the Navaho Indian Reservation." Thus, when the present litigation is concluded, there will be only one Navajo Reservation, and the Navajo tribe and its members will have rights in that unitary area. This of course is what Congress intended in 1958.

3. "Did the court err in holding that the Navajo Tribe, for the common use and benefit of its members, had any interest in the Hopi Executive Order Reservation?"

We think the answer to this is an obvious negative, and we refer particularly to the discussion at Op. 67-68, which demonstrates that the Navajo Indian Tribe itself, as well as certain of its members, had been settled by the Secretary of the Interior in the 1882 Executive Order Area.

But, while we therefore consider the Hopis' appellate contentions to be untenable, we join with the Hopis in asking that their appeal be also heard. No matter how tenuous their claims, we urge that, in the interest of ultimate reconciliation between the two quasi-sovereign Indian nations concerned, the Hopis' views be fully and patiently heard by this Court before their claims are finally rejected.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal by the Navajos, as well as of the cross-appeal by the Hopis.

We suggest that the two cases be consolidated.

And we hope that the Court will see fit to make a generous allowance of time for oral argument, appropriate to the mighty interests involved, to the end that, like a controversy between States of the Union, the case may be "considered in the untechnical spirit proper for dealing with a quasi international controversy." *Virginia* v. *West Virginia*, 220 U.S. 1, 27.

Respectfully submitted.

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Of Counsel.

APRIL 1963.

APPENDIX

APPENDIX

NOTE CONCERNING APPENDIX A

Appendix A, consisting of (1) the opinion of the court below (Op. 1-106); (2) appendix to opinion, being a chronological account of the Hopi-Navajo controversy (Op. 107-205); (3) findings of fact and conclusions of law (Op. 207-224); and (4) judgment (Op. 225-228), is presented under a separate cover.

The original document was printed and distributed to the parties by the court below.

As has been indicated, Appendix A is cited throughout the Jurisdictional Statement simply as "Op.," followed by references to the appropriate pages thereof.

APPENDIX B

SENATE COMMITTEE REPORT ON AUTHORIZING ACT

Calendar No. 265

85TH CONGRESS, 1st Session | SENATE | REPORT No. 265

PROVIDING THAT THE UNITED STATES HOLD IN TRUST FOR THE INDIANS ENTITLED TO THE USE THEREOF THE LANDS DESCRIBED IN THE EXECUTIVE ORDER OF DECEMBER 16, 1882, AND FOR ADJUDICATING THE CONFLICTING CLAIMS THERETO OF THE NAVAHO AND HOPI INDIANS.

MAY 1, 1957.—Ordered to be printed

Mr. GOLDWATER, from the Committee on Interior and Insular Affairs, submitted the following

REPORT

[To accompany S. 692]

The Committee on Interior and Insular Affairs, to whom was referred the bill (S. 692) to provide that the United States hold in trust for the Indians entitled to the use thereof the lands described in the Executive order of December 16, 1882, and for adjudicating the conflicting claims thereto of the Navaho and Hopi Indians, having considered the same, report favorably thereon with amendments and recommend that the bill, as amended, do pass.

The amendments are as follows:

(1) On Page 1, lines 5 and 6, delete "Indians who are entitled to be thereon" and insert in lieu thereof "Hopi Indians and such other Indians as heretofore have been settled thereon by the Secretary of the Interior".

(2) On page 2, line 12, after "claims" insert "pursuant to such Executive order".

(3) On page 2, line 20, delete "Any lands" and insert in lieu thereof "Lands, if any,".

(4) On page 2, line 23, delete "Any lands" and insert in lieu thereof "Lands, if any,".

(5) On page 3, lines 2 to 8, delete the sentence reading:

> If the court determines that the said Navaho Tribe, Hopi Tribe, including any Hopi village or clan thereof, or individual Indians have a joint or undivided interest in any part of the lands subject to section 1 of this Act, the court shall determine the reservation to which such lands shall be added as in its opinion shall be fair, just, and equitable.

(6) On page 3, line 15, after "conflicting" insert "tribal or individual".

(7) On page 3, line 17, change the period to a comma and add "or to affect the liability of the United States, if any, under litigation now pending before the Indian Claims Commission."

EXPLANATION OF THE BILL

The purpose of S. 692 as amended is twofold:

First, it would declare that the lands (2,472,216 acres) described in the Executive order dated December 16, 1882, are held in trust by the United States for the Indians entitled to be thereon. Second, it authorizes an adjudication by a three-judge district court of the conflicting claims of the Navaho and Hopi Indians to the lands set aside by the 1882 Executive order. The litigation will be in the nature of a quiet title action.

The 1882 Executive order set aside the lands "for the use and occupancy of the Hopi and such other Indians as the Secretary of the Interior may see fit to settle thereon." These lands are now completely surrounded by the Navaho Reservation, and ever since the establishment of the 1882 reservation there has been a dispute between the Navaho and the Hopi Tribes as to their respective rights on these lands. The Hopi Indians claim that they have exclusive use of the 1882 reservation, and the Navaho Indians claim they are the "other Indians" whom the Secretary of the

Interior has seen fit to settle on the lands and that they have valid interests in the reservation.

Although repeated efforts have been made to settle this conflict administratively, the situation has become progressively worse. The committee does not believe that Congress should attempt to determine the merits of this controversy, which is primarily legal in nature. Therefore it recommends the passage of this enabling legislation to permit the controversy to be litigated in the courts.

The Navaho Tribe and the Hopi Tribe, through their governing bodies, have requested this legislation, and the bill was drafted by the attorneys representing the tribes, in consulation with representatives of the Department of the Interior. The litigation to determine the conflicting interests of the Indians may be started by either tribe, or, if they do not take the initiative, by the Attorney General.

SECTION BY SECTION ANALYSIS OF THE BILL

Section 1 of S. 692 provides for the conversion of the present interests of the Indians under the Executive order of December 16, 1882, into a trust title, and then authorizes an adjudication of the conflicting claims of the Indians who assert those interests. The Navaho and Hopi Tribes are authorized to act in the litigation on their own behalf and also on behalf of clans, villages, or individuals claiming an interest in the lands. This will prevent any question arising about the right of the recognized governing body of the tribe to represent all component parts of the tribe.

Section 2 of the bill provides that any lands in which the court finds that the Navaho Tribe or individual Navaho Indians have the exclusive interest shall thereafter be a part of the Navaho Reservation, and any lands in which the court finds that the Hopi Tribe, village, clan, or individual has the exclusive interest shall thereafter be a reservation for the Hopi Indian Tribe. Provision is also made in section 2 of this bill for the Navaho and the Hopi Tribes, respectively, to sell, buy, or exchange land within their reservations with the approval of the Secretary of the Interior. By permitting sales or exchanges between the two tribes, it will be possible for the Navaho and Hopi Tribes to make satisfactory arrangements for any Indians displaced by the litigation.

Section 3 expresses the intent of Congress that nothing in this bill is to be construed as a congressional determination prior to adjudication of the rights and interests in the lands set aside by the Executive order of December 16, 1882, or affect the liability of the United States, if any, under litigation now pending before the Indian Claims Commission.

Legislation similar to that proposed in S. 692 was contained in S. 4086, 84th Congress, which passed the Senate on July 16, 1956. The committee again recommends the passage of this legislation and has incorporated all of the amendments suggested by the Department of the Interior.

The favorable reports of the Department of the Interior and the Bureau of the Budget on S. 692 follow:

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D. C., March 7, 1957.

Hon. JAMES E. MURRAY,
Chairman, Committee on Interior and Insular Affairs,
United States Senate, Washington, D. C.

DEAR SENATOR MURRAY: Your committee has requested a report on S. 692, a bill to provide that the United States hold in trust for the Indians entitled to the use thereof the lands described in the Executive order of December 16, 1882, and for adjudicating the conflicting claims thereto of the Navaho and Hopi Indians, and for other purposes.

We recommend that the bill be enacted if it is amended as suggested below.

The bill authorizes an adjudication by a three-judge district court, with a right of appeal directly to the Supreme Court, of the conflicting claims of the Navaho and Hopi Indians to the lands that were set aside by Executive order dated December 16, 1882. The litigation will be in the nature of a quiet title action.

The Executive order set aside the lands "for the use and occupancy of the Moqui [Hopi] and such other Indians as the Secretary of the Interior may see fit to settle thereon."

The 1882 reservation is completely surrounded by a reservation belonging to the Navaho Tribe. The Hopi

Indians claim that the 1882 reservation was set aside for their exclusive use and that the Navaho Indians are unlawful intruders with no right to be there. The Navaho Indians claim that they are "other Indians" whom the Secretary of the Interior has seen fit to settle on the 1882 reservation, within the meaning of the Executive order, and that they have valid interests in the reservation.

This conflict between the Navaho Indians and the Hopi Indians has existed since the 1882 reservation was first established, and because of increasing population pressures the conflict has become progressively worse. There is no practical way in which the conflict can be resolved administratively. This Department has made repeated efforts to resolve it, and has adopted from time to time regulations governing the use of the area. Because of the nature of the conflicting claims of use and occupancy interests, however, the Department cannot make a final determination that will be accepted. We believe that it is impracticable for the merits of the controversy to be determined by legislation, which would mean trying the merits of the case before Congress, and that the only practical solution to the problem is the enactment of enabling legislation that will permit the controversy, which is primarily legal in nature, to be litigated in the courts.

The recognized governing bodies of both the Navaho and the Hopi Tribes have asked for such enabling legislation, and the pending bill was drafted by the attorneys representing the two tribes, in consultation with representatives of this Department.

Section 1 of the bill provides that the Navaho and Hopi Tribes may act in the litigation on their own behalf and also on behalf of any individual Navaho or Hopi Indians who may claim an interest in the land. It would be completely impracticable to allow such individuals to appear and be represented separately. The bill also provides that the tribes will represent all villages and clans thereof, which will prevent any question from arising about the right of the recognized governing body of the tribe to represent all component parts of the tribe.

The litigation to determine the conflicting interests of the Indians under the Executive order may be started by either tribe, or, if the tribes do not take the initiative, by

the Attorney General. We understand that both of the tribes are willing to commence the action.

Section 2 of the bill provides that (1) any lands in which the court finds that the Navaho Tribe or individual Navahos have the exclusive interest shall thereafter be a part of the Navaho Reservation, (2) any lands in which the court finds that the Hopi Tribe, village, clan, or individual has the exclusive interest shall thereafter be a reservation for the Hopi Tribe, and (3) any lands in which the Navaho and Hopi Indians have a joint or undivided interest shall become a part of either the Navaho or the Hopi Reservation according to the court's determination of fairness and equity. This provision will assure that one or the other of the tribes will have administrative jurisdiction over the land in the future, without prejudice, however, to the undivided interests. It also makes it clear that the tribe will have jurisdiction notwithstanding the fact that its rights may be predicated upon the interests of individual members of the tribe. Furthermore, by providing that, after interests have been determined under the Executive order, the lands that are adjudicated to be Hopi lands will thereafter be a reservation for the Hopi Tribe, the bill converts the lands from an Executive order reservation into a statutory reservation.

Section 2 of the bill also authorizes either the Navaho or the Hopi Tribeto buy, sell, or exchange land within its reservation, with the approval of the Secretary of the Interior. This provision will permit sales or exchanges between the two tribes in order to take care of the needs of any Indians who may be displaced as a result of the litigation, or in order to adjust the title to land in one reservation that may be occupied by members of the other reservation. The authority is restricted to lands that are within the two reservations.

Section 3 of the bill provides that none of its provisions shall be construed to be a congressional determination prior to adjudication of the rights and interests in the lands set aside by the Executive order. Those rights and interests are to be adjudicated on the basis of the existing law without any advantage or disadvantage accruing from the enactment of the bill. After the adjudication has been completed, however, the provisions of section 2 for in-

corporating the lands in one or the other reservation will be effective.

In order to prevent any inference that Indians have compensable legal rights or title to lands in an Executive order reservation (as distinguished from a statutory reservation), section 1 of the bill first converts the present interests of the Indians under the Executive order into a trust title, and then authorizes an adjudication of the conflicting claims of the Indians who assert those interests. By this procedure the litigation will involve trust titles that are created by the new legislation, rather than noncompensable interests that are held by the Indians only at the sufferance of the Government. Inasmuch as it is most improbable that the Government would ever want to deprive the Indians of these lands, the conversion of their use rights into a trust title should present no practical problem.

The following technical and perfecting amendments are recommended:

1. On page 1, lines 5 and 6, delete "Indians who are entitled to be thereon" and insert in lieu thereof "Hopi Indians and such other Indians as heretofore have been settled thereon by the Secretary of the Interior."

2. On page 2, line 12, after "claims" insert "pursuant to such Executive order".

3. On page 2, line 20, delete "Any lands" and insert in lieu thereof "Lands, if any,".

4. On page 2, line 23, delete "Any lands" and insert in lieu thereof "Lands, if any,".

5. On page 3, lines 2 to 8, delete the sentence reading "If the court determines that the said Navaho Tribe, Hopi Tribe, including any Hopi village or clan thereof, or individual Indians have a joint or undivided interest in any part of the lands subject to section 1 of this Act, the court shall determine the reservation to which such lands shall be added as in its opinion shall be fair, just, and equitable." This is an action which the two tribes feel should not be legislated in advance of the judicial determination of their rights, and we agree with them.

6. On page 3, line 15, after "conflicting" insert "tribal or individual".

7. On page 3, line 17, change the period to a comma and add "or to affect the liability of the United States, if any,

under litigation now pending before the Indian Claims Commission." This change is intended to make sure that this act will neither increase nor decrease the Government's liability in pending claims litigation.

The Bureau of the Budget has advised us that there is no objection to the submission of this report.

Sincerely yours,

HATFIELD CHILSON,
Assistant Secretary of the Interior.

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington, D. C., March 1, 1957.

Hon. JAMES E. MURRAY,
Chairman, Committee on Interior and Insular Affairs,
United States Senate, Senate Office Building,
Washington, D. C.

MY DEAR MR. CHAIRMAN: This is in response to your request for the views of the Bureau of the Budget with respect to S. 692, a bill to provide that the United States hold in trust for the Indians entitled to the use thereof the lands described in the Executive order of December 16, 1882, and for adjudicating the conflicting claims thereto of the Navaho and Hopi Indians, and for other purposes.

The subject legislation is designed to settle a long-standing controversy between the Navaho and Hopi Indians over the use of certain lands set aside by the Executive order cited in the title of the bill. Several attempts to resolve this problem by administrative action have been unsuccessful chiefly because of the inability to obtain support of the respective tribal governments. The approach embodied in this bill has been approved by the recognized governing bodies of both tribes, and it is our understanding that these groups have agreed to recognize any decisions which may result from the procedures which would be established should the bill be enacted.

While legislation along the lines of S. 692 would therefore appear to provide a successful method of resolving the conflict, certain aspects of the bill raise serious problems of a legal nature which in the opinion of this

Bureau deserve careful congressional consideration. To this end, the views of both the Department of the Interior, which assisted in the development of the legislation, and the Department of Justice, which is opposed to enactment of the legislation, have been cleared without objection for presentation to the House Committee on Interior and Insular Affairs in connection with its consideration of H. R. 3789, the companion to S. 692.

Insofar as this Bureau is concerned, you are advised that it would interpose no objection to such course of action as the Congress may deem appropriate after reviewing the various facts and views presented in connection with these two bills.

Sincerely yours,

ROBERT E. MERRIAM,
Assistant Director.

APPENDIX C

HOUSE COMMITTEE REPORT ON AUTHORIZING ACT

85TH CONGRESS, 2d Session } HOUSE OF REPRESENTATIVES { REPORT No. 1942

DETERMINING RIGHTS AND INTERESTS OF THE NAVAHO TRIBE, HOPI TRIBE, AND INDIVIDUAL INDIANS TO CERTAIN LANDS

JUNE 23, 1958.—Committee to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. HALEY, from the Committee on Interior and Insular Affairs, submitted the following

REPORT

[To accompany S. 692]

The Committee on Interior and Insular Affairs, to whom was referred the bill (S. 692) to provide that the United States hold in trust for the Indians entitled to the use thereof the lands described in the Executive order of December 16, 1882, and for adjudicating the conflicting claims thereto of the Navaho and Hopi Indians, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill, as amended, do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following language:

That lands described in the Executive order dated December 16, 1882, are hereby declared to be held by the United States in trust for the Hopi Indians and such other Indians, if any, as heretofore have been settled thereon by

the Secretary of the Interior pursuant to such Executive order. The Navaho Indian Tribe and the Hopi Indian Tribe, acting through the chairmen of their respective tribal councils for and on behalf of said tribes, including all villages and clans thereof, and on behalf of any Navaho or Hopi Indians claiming an interest in the area set aside by Executive order dated December 16, 1882, and the Attorney General on behalf of the United States, are each hereby authorized to commence or defend in the United States District Court for the District of Arizona an action against each other and any other tribe of Indians claiming any interest in or to the area described in such Executive order for the purpose of determining the rights and interests of said parties in and to said lands and quieting title thereto in the tribes or Indians establishing such claims pursuant to such Executive order as may be just and fair in law and equity. The action shall be heard and determined by a district court of three judges in accordance with the provisions of title 28, United States Code, section 2284, and any party may appeal directly to the Supreme Court from the final determination by such three judge district court.

SEC. 2. Lands, if any, in which the Navaho Indian Tribe or individual Navaho Indians are determined by the court to have the exclusive interest shall thereafter be a part of the Navaho Indian Reservation. Lands, if any, in which the Hopi Indian Tribe, including any Hopi village or clan thereof, or individual Hopi Indians are determined by the court to have the exclusive interest shall thereafter be a reservation for the Hopi Indian Tribe. The Navaho and Hopi Tribes, respectively, are authorized to sell, buy, or exchange any lands within their reservations, with the approval of the Secretary of the Interior, and any such lands acquired by either tribe through purchase or exchange shall become a part of the reservation of such tribe.

SEC. 3. Nothing in this Act shall be deemed to be a congressional determination of the merits of the conflicting tribal or individual Indian claims to the lands that are subject to adjudication pursuant to this Act, or to affect the liability of the United States, if any, under litigation now pending before the Indian Claims Commission.

Amend the title so as to read:

A bill to determine the rights and interests of the Navaho Tribe, Hopi Tribe, and individual Indians to the area set

aside by Executive order of December 16, 1882, and for other purposes.

SUMMARY

The purpose of S. 692 is to provide for a determination of the rights and interests of the Navaho Tribe, Hopi Tribe, and individual Indians to the area set aside by the Executive order of December 16, 1882. There has been conflict and dispute for 75 years over the boundaries of the Hopi Reservation which is surrounded by the Navaho. This bill provides for a determination of the dispute by a district court of three judges with right of appeal to the Supreme Court.

No expenditure of Federal funds except for participation in the lawsuit will result from enactment of this legislation.

The Department of the Interior recommends several amendments which have been incorporated into the bill. Representatives of the Hopi Nation and the Navaho Tribe attended the hearings, and for the most part, indicated concurrence in the bill as reported.

EXPLANATION OF THE BILL

S. 692 provides that the 2,472,216 acres of land described in the December 16, 1882, Executive order s. ll be held in trust for the Hopi Indians and such other Indians, if any, as are entitled to be thereon. It also authorizes an adjudication by a three-judge district court of the conflicting claims of the Hopi and Navaho Indians to the lands in question. The litigation will be in the nature of a quiet title action.

The 1882 Executive order set aside other lands "for the use and occupancy of the Hopi and such other Indians as the Secretary of the Interior may see fit to settle thereon." These lands are now completely surrounded by the Navaho Reservation and there has been considerable settling by members of both tribes outside their respective reservations. The Hopi Nation contends that its members have exclusive use of the 1882 reservation, while the Navahos claim they are "other Indians" whom the Secretary of the Interior has seen fit to settle on the lands and that they have valid interests in the reservation.

The Bureau of Indian Affairs has made repeated, but unsuccessful, efforts to settle the dispute which, with discovery of oil, gas, and uranium in the area, has become

acute. The committee does not believe Congress should attempt to determine the merits of this legal controversy through legislation and recommends enactment of S. 692, which will permit the dispute to be litigated in court.

SECTIONAL ANALYSIS

Section 1 provides for the conversion of the present interest of the Indians under the Executive order of December 16, 1882, into a trust title, and authorizes an adjudication of the conflicting claims of the Indians who assert those interests. The Navaho and Hopi Tribes are authorized to act in the litigation on their own behalf and also on behalf of clans, villages, or individuals claiming an interest in the lands. This will prevent any question about the right of the recognized governing body of the tribe to represent all component parts of the tribe. The section also provides for the litigation to be held before a district court of three judges in accordance with provisions of the United States Code with the right of appeal to the Supreme Court.

Section 2 provides that any lands in which the Navaho Tribe or individual Navaho Indians have the exclusive interest shall thereafter be a part of the Navaho Reservation, and any lands in which the court finds that the Hopi Tribe, village, clan, or individual has the exclusive interest shall thereafter be a reservation for the Hopi Indian Tribe. Provision is also made in this section for the Navaho and Hopi Tribes, respectively, to sell, buy, or exchange any lands within their reservation with the approval of the Secretary of the Interior.

Section 3 expresses the intent of Congress that nothing in S. 692 is to be construed as a congressional determination of the rights and interests in the lands set aside by the Executive order, or to affect the liability of the United States, if any, under litigation now pending before the Indian Claims Commission.

H. R. 3789, a bill similar to S. 692, was introduced by Representative Udall, and considered concurrently with the reported bill. Hearings were held on similar legislation during the 84th Congress.

Amendments recommended by the Secretary of the Interior were among those incorporated into the reported bill. It is noted that certain factions within the Hopi Tribe are not in sympathy with this legislation but, following ex-

tended hearings, the committee Members feel that S. 692 is in the best interest of both the Hopi and Navaho Tribes.

The favorable report on H. R. 3789 from the Secretary of the Interior dated February 26, 1957, and his supplemental report containing recommended amendments dated March 19, 1957, are as follows:

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D. C., February 26, 1957.

HON. CLAIR ENGLE,
Chairman, Committee on Interior and Insular Affairs,
House of Representatives, Washington, D. C.

DEAR MR. ENGLE: Your committee has requested a report on H.R. 3789, a bill to determine the rights and interests of the Navaho Tribe, Hopi Tribe, and individual Indians to the area set aside by Executive order of December 6, 1882, and for other purposes.

We recommend that the bill be enacted if it is amended as suggested below.

The bill authorizes an adjudication by a three-judge district court, with a right of appeal directly to the Supreme Court, of the conflicting claims of the Navaho and Hopi Indians to the lands that were set aside by Executive order dated December 16, 1882. The litigation will be in the nature of a quiet title action.

The Executive order set aside the lands "for the use and occupancy of the Moqui [Hopi] and such other Indians as the Secretary of the Interior may see fit to settle thereon".

The 1882 reservation is completely surrounded by a reservation belonging to the Navaho Tribe. The Hopi Indians claim that the 1882 reservation was set aside for their exclusive use and that the Navaho Indians are unlawful intruders with no right to be there. The Navaho Indians claim that they are "other Indians" whom the Secretary of the Interior has seen fit to settle on the 1882 reservation, within the meaning of the Executive order, and that they have valid interests in the reservation.

This conflict between the Navaho Indians and the Hopi Indians has existed since the 1882 reservation was first established, and because of increasing population pressures, the conflict has become progressively worse. There is no

practical way in which the conflict can be resolved administratively. This Department has made repeated efforts to resolve it, and has adopted from time to time regulations governing the use of the area. Because of the nature of the conflicting claims of use and occupancy interests, however, the Department cannot make a final determination that will be accepted. We believe that it is impracticable for the merits of the controversy to be determined by legislation, which would mean trying the merits of the case before Congress, and that the only practical solution to the problem is the enactment of enabling legislation that will permit the controversy, which is primarily legal in nature, to be litigated in the courts.

The recognized governing bodies of both the Navaho and the Hopi Tribes have asked for such enabling legislation, and the pending bill was drafted by the attorneys representing the two tribes, in consultation with representatives of this Department.

Section 1 of the bill provides that the Navaho and Hopi Tribes may act in the litigation on their own behalf and also on behalf of any individual Navaho or Hopi Indians who may claim an interest in the land. It would be completely impracticable to allow such individuals to appear and be represented separately. The bill also provides that the tribes will represent all villages and clans thereof, which will prevent any question from arising about the right of the recognized governing body of the tribe to represent all component parts of the tribe.

The litigation to determine the conflicting interests of the Indians under the Executive order may be started by either tribe, or, if the tribes do not take the initiative, by the Attorney General. We understand that both of the tribes are willing to commence the action.

Section 2 of the bill provides that (1) any lands in which the court finds that the Navaho Tribe or individual Navahos have the exclusive interest shall thereafter be a part of the Navaho Reservation, (2) any lands in which the court finds that the Hopi Tribe, village, clan, or individual has the exclusive interest shall thereafter be a reservation for the Hopi Tribe, and (3) any lands in which the Navaho and Hopi Indians have a joint or undivided interest shall become a part of either the Navaho or the Hopi Reservation according to the court's determination of fairness and equity. This provision will assure that one or the other of

the tribes will have administrative jurisdiction over the land in the future, without prejudice, however, to the undivided interests. It also makes it clear that the tribe will have jurisdiction notwithstanding the fact that its rights may be predicated upon the interests of individual members of the tribe. Furthermore, by providing that, after interests have been determined under the Executive order, the lands that are adjudicated to be Hopi lands will thereafter be a reservation for the Hopi Tribe, the bill converts the lands from an Executive order reservation into a statutory reservation.

Section 2 of the bill also authorizes either the Navaho or the Hopi Tribe to buy, sell, or exchange land within its reservation, with the approval of the Secretary of the Interior. This provision will permit sales or exchanges between the two tribes in order to take care of the needs of any Indians who may be displaced as a result of the litigation, or in order to adjust the title to land in one reservation that may be occupied by members of the other reservation. The authority is restricted to lands that are within the two reservations.

Section 3 of the bill provides that none of its provisions shall be construed to be a congressional determination prior to adjudication of the rights and interests in the lands set aside by the Executive order. Those rights and interests are to be adjudicated on the basis of the existing law without any advantage or disadvantage accruing from the enactment of the bill. After the adjudication has been completed, however, the provisions of section 2 for incorporating the lands in one or the other reservation will be effective.

In order to remove from the bill any basis for an inference that Indians have compensable legal rights or title to lands in an Executive order reservation (as distinguished from a statutory reservation), we recommend that the form of the bill be recast so that it first converts the present interests of the Indians under the Executive order into a trust title, and then authorizes an adjudication of the conflicting claims of the Indians who assert those interests. By this procedure the litigation will involve trust titles that are created by the new legislation, rather than noncompensable interests that are held by the Indians only at the sufferance of the Government. Inasmuch as it is most improbable that the Government would ever want to deprive

the Indians of these lands, the conversion of their use rights into a trust title should present no practical problem.

The amendments necessary for the foregoing purposes are:

1. On page 1, line 3, after "That" delete "the" and insert in lieu thereof "lands described in the Executive order dated December 16, 1882, are hereby declared to be held by the United States in trust for the Hopi Indians and such other Indians as heretofore have been settled thereon by the Secretary of the Interior pursuant to such Executive order. The".

2. On page 1, line 6, before "any Navaho" insert "on behalf of".

3. On page 3, line 9, delete "any rights or interests in" and insert in lieu thereof "the merits of the conflicting tribal or individual Indian claims to".

The Bureau of the Budget has advised us that there is no objection to the submission of this report.

Sincerely yours,

HATFIELD CHILSON,
Assistant Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D. C., March 19, 1957.

HON. JAMES A. HALEY,
Chairman, Subcommittee on Indian Affairs,
Committee on Interior and Insular Affairs,
House of Representatives, Washington, D. C.

DEAR MR. HALEY: In accordance with Mr. Aspinall's request during the hearing on H. R. 3789, a bill to determine the rights and interests of the Navaho Tribe, Hopi Tribe, and individual Indians to the area set aside by Executive order of December 6, 1882, and for other purposes, the following amendments to the bill are submitted and we recommend that they be incorporated in the bill. They are in addition to the amendments recommended by our report dated February 26, 1957.

1. In the title of the bill and also on page 1, line 8, change "December 6" to "December 16".

2. On page 2, line 7, after "claims" insert "pursuant to such Executive order". The purpose is to make clear that the relative rights and interests of the two groups of Indians are those that have been established under the Executive order.

3. On page 2, line 14, delete "Any lands" and insert in lieu thereof "Lands, if any,".

4. On page 2, line 17, delete "Any lands" and insert in lieu thereof "Lands, if any,". The purpose is to prevent any inference from the language of the bill that either tribe may have exclusive rights.

5. On page 2, line 21, delete the sentence beginning on line 21 and ending on page 3, line 2. The purpose is to leave for future determination the question of tribal control over lands in which the Navahos and Hopis may have a joint and undivided interest. The two tribes feel that this question cannot be adequately resolved until the nature of their rights is adjudicated, and that the question is properly one for determination by Congress rather than by the courts. We agree with that position. Until the nature of their respective interests is adjudicated it is difficult to determine whether any part of or interest in the lands should be put under the exclusive jurisdiction of either tribe.

6. On page 3, line 10, change the period to a comma and add "or to affect the liability of the United States, if any, under litigation now pending before the Indian Claims Commission."

The purpose is to make clear that the adjudication of the conflicting interests of the Navaho and Hopi Indians in the Executive order reservation will not affect in any way the pending claims litigation.

Sincerely yours,

HATFIELD CHILSON,
Acting Secretary of the Interior.

The Committee on Interior and Insular Affairs recommends enactment of S. 692.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 985

PAUL JONES, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe, etc., *Appellant*,

v.

DEWEY HEALING, Chairman of the Hopi Council of the Hopi Indian Tribe, etc., and ROBERT F. KENNEDY, Attorney General of the United States, on behalf of the United States.

Appeal from the United States District Court for the District of Arizona

APPENDIX A TO JURISDICTIONAL STATEMENT

OPINION OF THE COURT; APPENDIX TO OPINION—CHRONOLOGICAL ACCOUNT OF HOPI-NAVAJO CONTROVERSY; FINDINGS OF FACT AND CONCLUSIONS OF LAW; JUDGMENT

[Note: All citations in the Jurisdictional Statement to "Op." are to this document.]

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DEWEY HEALING, CHAIRMAN OF THE HOPI TRIBAL COUNCIL OF THE HOPI INDIAN TRIBE, FOR AND ON BEHALF OF THE HOPI INDIAN TRIBE, INCLUDING ALL VILLAGES AND CLANS THEREOF, AND ON BEHALF OF ANY AND ALL HOPI INDIANS CLAIMING ANY INTEREST IN THE LANDS DESCRIBED IN THE EXECUTIVE ORDER DATED DECEMBER 16, 1882,

Plaintiff,

vs.

PAUL JONES, CHAIRMAN OF THE NAVAJO TRIBAL COUNCIL OF THE NAVAJO INDIAN TRIBE FOR AND ON BEHALF OF THE NAVAJO INDIAN TRIBE, INCLUDING ALL VILLAGES AND CLANS THEREOF, AND ON BEHALF OF ANY AND ALL NAVAJO INDIANS CLAIMING ANY INTEREST IN THE LANDS DESCRIBED IN THE EXECUTIVE ORDER DATED DECEMBER 16, 1882; ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, ON BEHALF OF THE UNITED STATES,

Defendants.

No. Civil 579 Prescott

Filed September 28, 1962

OPINION OF THE COURT

APPENDIX TO OPINION—CHRONOLOGICAL ACCOUNT OF HOPI-NAVAJO CONTROVERSY

FINDINGS OF FACT AND CONCLUSIONS OF LAW

JUDGMENT

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DEWEY HEALING, CHAIRMAN OF THE HOPI TRIBAL COUNCIL OF THE HOPI INDIAN TRIBE, FOR AND ON BEHALF OF THE HOPI INDIAN TRIBE, INCLUDING ALL VILLAGES AND CLANS THEREOF, AND ON BEHALF OF ANY AND ALL HOPI INDIANS CLAIMING ANY INTEREST IN THE LANDS DESCRIBED IN THE EXECUTIVE ORDER DATED DECEMBER 16, 1882,

Plaintiff,

vs.

PAUL JONES, CHAIRMAN OF THE NAVAJO TRIBAL COUNCIL OF THE NAVAJO INDIAN TRIBE FOR AND ON BEHALF OF THE NAVAJO INDIAN TRIBE, INCLUDING ALL VILLAGES AND CLANS THEREOF, AND ON BEHALF OF ANY AND ALL NAVAJO INDIANS CLAIMING ANY INTEREST IN THE LANDS DESCRIBED IN THE EXECUTIVE ORDER DATED DECEMBER 16, 1882; ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, ON BEHALF OF THE UNITED STATES,

Defendants.

No. Civil 579 Prescott

Filed September 28, 1962

OPINION OF THE COURT

APPENDIX TO OPINION—CHRONOLOGICAL ACCOUNT OF HOPI-NAVAJO CONTROVERSY

FINDINGS OF FACT AND CONCLUSIONS OF LAW

JUDGMENT

Opinion of the Court 1-106

Appendix to Opinion—Chronological Account of Hopi-Navajo Controversy 107-205

Findings of Fact and Conclusions of Law 207-224

Judgment 225-228

EXECUTIVE ORDER OF DECEMBER 16, 1882

Executive Mansion
December 6, 1882

It is hereby ordered that the tract of country in the territory of Arizona, lying and being within the following described boundaries, viz beginning on the one hundred and tenth degree of longitude west from Greenwich, at a point 34° 30' north, thence due west to the one hundred and eleventh degree of longitude west, thence due south to a point of longitude 33° 30' north, thence due east to the one hundred and tenth degree of longitude west thence due north to place of beginning be and the same is hereby withdrawn from settlement and sale; and set apart for the use and occupancy of the Moqui and such other Indians as the Secretary of the Interior may see fit to settle thereon.

Chester A. Arthur

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DEWEY HEALING, CHAIRMAN OF THE HOPI TRIBAL COUNCIL OF THE HOPI INDIAN TRIBE, FOR AND ON BEHALF OF THE HOPI INDIAN TRIBE, INCLUDING ALL VILLAGES AND CLANS THEREOF, AND ON BEHALF OF ANY AND ALL HOPI INDIANS CLAIMING ANY INTEREST IN THE LANDS DESCRIBED IN THE EXECUTIVE ORDER DATED DECEMBER 16, 1882,

Plaintiff,

vs.

PAUL JONES, CHAIRMAN OF THE NAVAJO TRIBAL COUNCIL OF THE NAVAJO INDIAN TRIBE FOR AND ON BEHALF OF THE NAVAJO INDIAN TRIBE, INCLUDING ALL VILLAGES AND CLANS THEREOF, AND ON BEHALF OF ANY AND ALL NAVAJO INDIANS CLAIMING ANY INTEREST IN THE LANDS DESCRIBED IN THE EXECUTIVE ORDER DATED DECEMBER 16, 1882; ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, ON BEHALF OF THE UNITED STATES,

Defendants.

No. Civil 579 Prescott

Before: HAMLEY, Circuit Judge, and YANKWICH and WALSH, District Judges

HAMLEY, Circuit Judge:

We have for determination in this action the conflicting claims of the Hopi and Navajo Indians in and to Indian reservation lands situated in northeastern Arizona.

These lands, consisting of some 2,500,000 acres, or 3,900 square miles, were withdrawn from the public domain under an executive order signed by President Chester A. Arthur on December 16, 1882. In that order it was provided that this rectangular

tract, about seventy miles long and fifty-five miles wide, hereinafter referred to as the 1882 reservation, would be ". . . for the use and occupancy of the Moqui, and such other Indians as the Secretary of the Interior may see fit to settle thereon."[1]

The Hopi Indian Tribe has long contended that it has the exclusive beneficial interest in all of the 1882 reservation for the common use and benefit of the Hopi Indians, trust title being conceded to be in the United States. The Navajo Indian Tribe contends that, subject to the trust title of the United States, it has the exclusive interest in approximately four-fifths of the 1882 reservation for the common use and benefit of the Navajo Indians, and concedes that the Hopi Indian Tribe has the exclusive interest in the remainder. The controversy resulting from these conflicting claims presents what has been characterized as "the greatest title problem of the West."

Over a period of many years efforts have been made to resolve the controversy by means of agreement, administrative action, or legislation, all without success. The two tribes and officials of the Department of the Interior finally concluded that resort must be had to the courts. This led to the enactment of the Act of July 22, 1958, 72 Stat. 402.[2]

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[1]The "Hopi" and the "Moqui" are one and the same Indian people. The "Navajo" and the "Navaho" are one and the same Indian people. The Executive Order of December 16, 1882, reads as follows:

"Executive Mansion,
December 16, 1882.

"It is hereby ordered that the tract of country, in the territory of Arizona, lying and being within the following described boundaries, viz: beginning on the one hundred and tenth degree of longitude west from Greenwich, at a point 36° 30′ north, thence due west to the one hundred and eleventh degree of longitude west, thence due south to a point of longitude 35° 30′ north; thence due east to the one hundred and tenth degree of longitude west, thence due north to the place of beginning, be and the same is hereby withdrawn from settlement and sale, and set apart for the use and occupancy of the Moqui, and such other Indians as the Secretary of the Interior may see fit to settle thereon.

"CHESTER A. ARTHUR"

[2]The Act of July 22, 1958, reads as follows:

'Public Law 85-547

"AN ACT

"To determine the rights and interests of the Navaho Tribe, Hopi Tribe, and individual Indians to the area set aside by Executive order of December 16, 1882, and for other purposes.

The 1958 act authorized the chairmen of the tribal councils of the respective tribes, and the Attorney General on behalf of the United States, to commence or defend an action against each other and any other tribe of Indians claiming any interest in or

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"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That lands described in the Executive order dated December 16, 1882, are hereby declared to be held by the United States in trust for the Hopi Indians and such other Indians, if any, as heretofore have been settled thereon by the Secretary of the Interior pursuant to such Executive order. The Navaho Indian Tribe and the Hopi Indian Tribe, acting through the chairmen of their respective tribal councils for and on behalf of said tribes, including all villages and clans thereof, and on behalf of any Navaho or Hopi Indians claiming an interest in the area set aside by Executive order dated December 16, 1882, and the Attorney General on behalf of the United States, are each hereby authorized to commence or defend in the United States District Court for the District of Arizona an action against each other and any other tribe of Indians claiming any interest in or to the area described in such Executive order for the purpose of determining the rights and interests of said parties in and to said lands and quieting title thereto in the tribes or Indians establishing such claims pursuant to such Executive order as may be just and fair in law and equity. The action shall be heard and determined by a district court of three judges in accordance with the provisions of title 28 United States Code, section 2284, and any party may appeal directly to the Supreme Court from the final determination by such three judge district court.

"SEC. 2. Lands, if any, in which the Navaho Indian Tribe or individual Navaho Indians are determined by the court to have the exclusive interest shall thereafter be a part of the Navaho Indian Reservation. Lands, if any, in which the Hopi Indian Tribe, including any Hopi village or clan thereof, or individual Hopi Indians are determined by the court to have exclusive interest shall thereafter be a reservation for the Hopi Indian Tribe. The Navaho and Hopi Tribes, respectively, are authorized to sell, buy, or exchange any lands within their reservations, with the approval of the Secretary of the Interior, and any such lands acquired by either tribe through purchase or exchange shall become a part of the reservation of such tribe.

"SEC. 3. Nothing in this Act shall be deemed to be a congressional determination of the merits of the conflicting tribal or individual Indian claims to the lands that are subject to adjudication pursuant to this Act, or to affect the liability of the United States, if any, under litigation now pending before the Indian Claims Commission.

"Approved July 22, 1958."

to the 1882 reservation. As indicated in section 1 of the act, the purpose of any such action would be to determine the rights and interests of these parties in and to the lands and to quiet title thereto in the tribes or Indians "establishing such claims pursuant to such Executive order as may be just and fair in law and equity."

With respect to any interest which either tribe or the Indians thereof might be thus found to have in any of the lands, it was provided, in section 2, that the court would determine whether such interest is exclusive or otherwise. Under that section, lands in which either tribe or the Indians thereof are determined to have the exclusive interest shall thereafter, in the case of the Navajos, "be a part of the Navaho Indian Reservation," and, in the case of the Hopis, "be a reservation for the Hopi Indian Tribe."

Under section 1 of the 1958 act, any such action was required to be heard and determined by a district court of three judges convened and functioning in accordance with the provisions of 28 U.S.C. § 2284, with the right in any party to take a direct appeal to the Supreme Court from the final determination by such district court.

Proceeding under this act, Willard Sekiestewa, then the duly authorized chairman of the Hopi Tribal Council of the Hopi Indian Tribe, commenced this action on August 1, 1958. He did so for and on behalf of the Hopi Indian Tribe including all villages and clans thereof, and on behalf of any and all Hopi Indians. Sekiestewa has since been succeeded, as chairman of the Hopi Tribal Council by Dewey Healing, and the latter has been substituted as party plaintiff.

Two defendants were named in the complaint. One is Paul Jones, the duly authorized chairman of the Navajo Tribal Council of the Navajo Indian Tribe, including all villages and clans thereof, and on behalf of any and all Navajo Indians claiming any interest in the 1882 reservation.

The other defendant named in the complaint is William P. Rogers, then Attorney General of the United States, on behalf of the United States. Rogers has since been succeeded, as Attorney General, by Robert F. Kennedy. The latter has been automatically substituted for Rogers as a party defendant by operation of Rule 25(d) Federal Rules of Civil Procedure, 28 U.S.C.A.

Upon the filing of the complaint a district court of three judges was duly constituted in accordance with the provisions of § 2284 referred to above. One change was subsequently made in the personnel thereof, as noted in our previous opinion, *Healing v. Jones*, 174 F. Supp. 211, decided May 25, 1959. The court is now comprised of the judges named above.

Defendant Jones filed an answer, counterclaim and cross-claim. The Attorney General filed an answer in which two defenses were asserted.

Under the 1958 act, the parties authorized to institute this litigation were empowered to name, as defendants, in addition to each other, "any other tribe of Indians claiming any interest in or to the area described in such Executive order. . ." The court has been advised by counsel that exhaustive studies and investigations conducted by field workers, historians and anthropologists have failed to reveal that any Indians or Indian tribes other than Hopis and Navajos have or claim any interest in any part of the 1882 reservation. Consequently the parties to this action, named above, did not join, as defendants, any other Indian or Indian tribe. Nor has any other Indian or Indian tribe sought to intervene or otherwise participate in this action, notwithstanding the fact that the pendency of this litigation has been given widespread publicity throughout the affected area.

One of the defenses set out in the answer of the United States is that this court is without jurisdiction because the rights and interests to be determined herein assertedly present a political and not a judicial question. Pursuant to Rule 12(d), Federal Rules of Civil Procedure, 28 U.S.C.A., and upon the motion of plaintiff, a hearing was first had on this defense challenging the jurisdiction of the court.

At this hearing plaintiff and defendant Jones opposed the position of the Government and argued that the court had jurisdiction. We decided that this court had jurisdiction to hear and determine the action. The first defense of the United States was accordingly dismissed. *Healing v. Jones*, 174 F.Supp. 211. At the same hearing certain motions directed to the pleadings were argued and later disposed of as indicated in the opinion just cited.[3]

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[3]Unless otherwise indicated, references hereinafter to "defendant," will mean Paul Jones, Chairman of the Navajo Tribal Council, and

Extensive pretrial proceedings were thereafter had, including pretrial conferences on March 16, 1959 and August 18, 1960. The parties exchanged documents, submitted documents for identification, filed statements of contentions, and entered into stipulations concerning certain facts, issues of fact and law, and exhibits, all in advance of trial. It is provided in pretrial order No. 2, filed March 28, 1960, that pretrial orders Nos. 1 and 2 shall supersede all pleadings and render moot all motions then pending directed against the pleadings.

As set forth in the pretrial orders, and as explained during pretrial hearings, plaintiff claims that all of the lands described in the order of December 16, 1882, are held in trust by the United States exclusively for the Hopi Indians and that neither the Navajo Indian Tribe, and its villages, clans or individual members, nor any other Indian or Indian tribe, village or clan, has any estate, right, title or interest therein or any part thereof. Plaintiff seeks a decree of this court quieting title to all of these lands in the United States in trust exclusively for the Hopi Indians.

Plaintiff further claims that if (but not conceding) some Navajo Indians have been settled on the reservation lands in the manner provided in the order of December 16, 1882, rights and interests thereby acquired, if any, do not inure to the benefit of the Navajo Indian Tribe in general, or to Navajo Indians who have not been settled on the reservation, but only to the group of Navajo Indians actually settled therein and to their descendants, collectively. Plaintiff also claims that such rights and interests, if any, acquired by any such group of Navajo Indians, are not exclusive as to any part of the reservation area, but are co-extensive with those of the Hopi Indians.

As set forth in the pretrial orders and explained during pretrial hearings, defendant concedes that the United States holds in trust for the Hopi Indians a portion of the executive order lands, described with particularity in pretrial order No. 2, and in paragraph 12 of the findings of fact herein. This tract, consisting of about 488,000 acres, is located in the south central part of the executive order reservation and includes the Hopi villages located on three mesas. Defendant claims that the remaining four-

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references to the "parties" will mean Dewey Healing and Paul Jones, representing the Hopi and Navajo Indians and Indian Tribes, respectively.

fifths of the 1882 reservation is held in trust by the United States exclusively for the Navajo Indian Tribe. In the map following this page of the opinion, the boundary lines of the area which defendant concedes to plaintiff, and other boundary lines to be discussed in this opinion are depicted.

Defendant makes no claim on behalf of any member of the Navajo Indian Tribe or any Navajo Indian using or occupying, or who has or has had any claim of any right, title or interest in the use and occupancy of, any part, parcel or portion of the lands described in the order of December 16, 1882, except as beneficiary under the Navajo tribal claim. Defendant seeks a decree of this court quieting title to the lands in question in the United States in trust exclusively for the Hopi and Navajo Indian Tribes in accordance with his claims summarized above.

The second defense of the Attorney General is that the United States is a stakeholder with respect to the lands involved in this suit. For this reason, it was alleged, the Attorney General would take no position as between the claims of the other parties and would assert no claim on behalf of any other Indian or Indian tribe. Throughout the proceedings, after denial of its first defense, the Attorney General, represented by the office of the United States Attorney in Phoenix, Arizona has, consistent with its position as stakeholder, assumed the passive role of observer.

The cause came on for trial at Prescott, Arizona, on September 26, 1960, and continued without interruption to its conclusion on October 22, 1960. Proposed findings of fact and opening briefs were filed by both parties followed by objections to the proposed findings of the opposing party, and reply briefs. The case was taken under submission on August 2, 1961, when the last of these briefs were filed.

Concurrently with the filing of this opinion this court has entered its findings of fact, conclusions of law, and judgment herein.

In the judgment it is declared and adjudicated that, subject to the trust title of the United States, the Hopi Indian Tribe, for the common use and benefit of the Hopi Indians, has the exclusive interest in and to that part of the 1882 reservation lying within the boundaries of land management district 6, as defined on April 24, 1943, which area is described in the judgment and in paragraph 41 of the findings of fact and is depicted

on the map which is a part of this opinion. Accordingly, and pursuant to section 2 of the Act of July 22, 1958, it is declared and adjudicated in the judgment that such area is a reservation for the Hopi Indian Tribe.

In the judgment it is further declared and adjudicated, subject to the trust title of the United States, that the Hopi Indian Tribe, for the common use and benefit of the Hopi Indians, and the Navajo Indian Tribe, for the common use and benefit of the Navajo Indians, have joint, undivided and equal interests in and to all of the 1882 reservation lying outside the boundaries of land management district 6 as defined on April 24, 1943. Accordingly, it is declared and adjudicated in the judgment that such area is a reservation for the joint use of the Hopi and Navajo Indian Tribes.

The judgment quiets title in and to the 1882 reservation lands in accordance with the declared rights and interests of the respective tribes.

In this opinion we will discuss the principal questions of fact and law which have been resolved by the findings of fact, conclusions of law, and judgment which we have entered. A chronological account of the Hopi-Navajo controversy, added as an appendix to this opinion, contains marginal references to the record.

The rights and interests in the reservation lands, as declared and adjudicated herein, derive from the Executive Order of December 16, 1882, and from events which thereafter occurred. In this discussion we will first consider what rights and interests, if any, were acquired by the two tribes and their respective members as a result of the December 16, 1882 order standing alone. We will then discuss the extent to which any such rights and interests were enlarged or diminished, and similar rights, if any, were newly created, by reason of events occurring after that date.

Rights and Interests Acquired by Hopis on December 16, 1882

It has been the consistent position of the Hopis from the outset of this litigation that the rights which they assertedly have in the reservation arise from the 1882 executive order standing

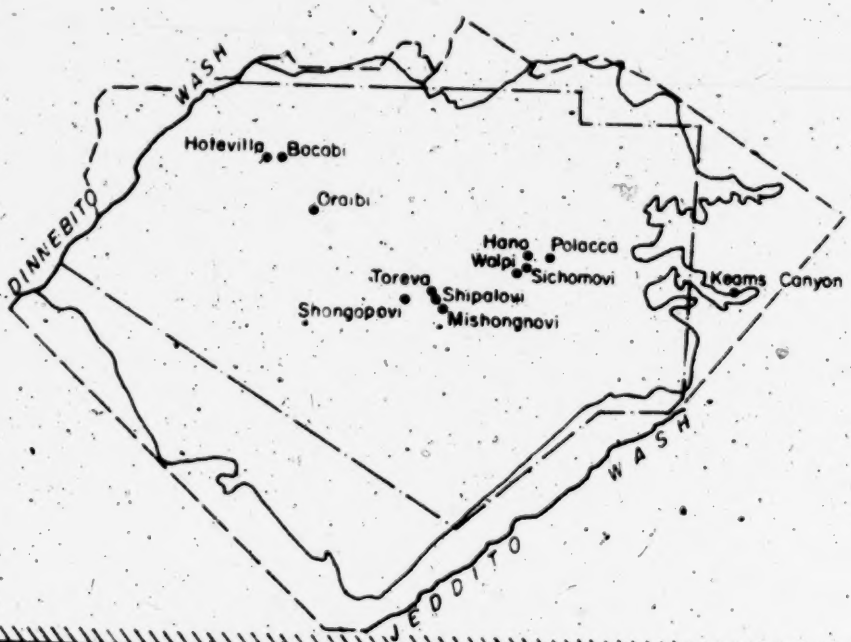
LEGEND

1882 Executive Order Area: A rectangle of land approximately 70 miles north to south and 57 miles east to west. The north boundary line is located approximately 34 miles south of the Arizona-Utah state line and the eastern line is 54 miles west of the Arizona-New Mexico state line. The northeast corner of the Executive Order Area is approximately 63 miles WSW from the Four Corner Monument marking the corner common to Arizona, New Mexico, Colorado, and Utah.

Boundary conceded by the Navajo to be Hopi.

Boundary of Land Management District 6 as originally created in 1936.

Boundary of Land Management District 6 as approved April 24, 1943.



Note: This map represents a simplified version of one in larger scale filed in the records of the case pursuant to stipulation of counsel for the parties dated August 15, 1962.

alone, and are in no sense dependent upon a showing that they have been settled in the reservation by authority of the Secretary of the Interior.

On the tentative assumption that the Hopis were correct in this it was ordered, during the pretrial proceedings, that, at the trial, the Navajos should proceed first with their case. It was further ordered that the question of whether the Hopis must, in order to establish their claim, prove they were settled in the reservation by the Secretary, would be argued and decided during the course of the trial after the basic evidence had been received but while there was still opportunity for the Hopis to produce additional evidence. This procedure was followed and during the trial the court ruled from the bench, after argument and conference, that whatever rights the Hopi Indians may have gained in and to the 1882 reservation are not dependent upon a showing that they had been settled therein by permission of the Secretary.

Defendant has asked us to reconsider this ruling and we have done so.

Such reconsideration logically begins with an analysis of the language of the Executive Order of December 16, 1882. It is recited in that order that the lands therein described are set apart "for the use and occupancy of the Moqui, and such other Indians as the Secretary may see fit to settle thereon."

In the quoted clause the "Moqui" Indians are specifically named, a comma appears after the word "Moqui," and there is no comma after the word "Indians." This specific reference to the Hopis, and the punctuation, indicate that the words "as the Secretary may see fit to settle thereon," do not apply to the Hopi Indians, but only to "such other Indians." Under this construction the Hopis would appear to have acquired immediate rights and interest in and to the 1882 reservation, without the need of any Secretarial action permitting them to "settle" on the reservation.

The language is not ambiguous in this regard and therefore reference to extrinsic aids to construction, such as the factual setting in which the 1882 order was issued, hardly seems necessary. We have nevertheless examined the evidence pertaining thereto and now state the background facts pertaining to the establishment of this reservation.

No Indians in this country have a longer authenticated history than the Hopis. As far back as the Middle Ages the ancestors of the Hopis occupied the area between Navaho Mountain and the Little Colorado River, and between the San Francisco Mountains and the Luckachukas. In 1541, a detachment of the Spanish conqueror, Coronado, visited this region and found the Hopis living in villages on mesa tops, cultivating adjacent fields, and tending their flocks and herds.[4]

The level summits of these mesas are about six hundred feet above the surrounding sandy valleys and semi-arid range lands. The village houses, grouped in characteristic pueblo fashion, were made of stone and mud two, three, and sometimes four stories high. Water had to be brought by hand from springs at the foot of each mesa.

The Hopis were a timid and inoffensive people, peaceable and friendly with outsiders. They were also intelligent and industrious although their working time was frequently interrupted by lengthy religious ceremonials and exhausting tribal dances. A government agency, with headquarters at Keams Canyon, twelve miles east of the nearest Hopi village, was established for the Hopis in 1863. They had no reservation prior to December 16, 1882, at which time they numbered about eighteen hundred.

The recorded history of the Navajos does not extend as far back as that of the Hopis. They are mentioned in preserved journals for the first time in 1629. From all historic evidence it appears that the Navajos entered what is now Arizona in the last half of the eighteenth century. By 1854 there were at least eight thousand Navajos residing on the tributaries of the San Juan River, west of the Rio Grande and east of the Colorado, and between the 35th and 37th parallels of north latitude.

In 1863, Col. Christopher ("Kit") Carson, led a force which rounded up several thousand Navajos and interned them at Bosque Redondo, on the Pecos River, near Fort Sumner, in New Mexico. In 1868, the United States entered into a treaty with the Navajos (15 Stat. 667), under which the latter were granted

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[4]In 1692 another Spanish officer, Don Diego De Vargas, visited the area where he met the Hopis and saw their villages. American trappers first encountered the Hopis in 1834. In 1848, by the Treaty of Guadalupe Hidalgo, 9 Stat. 922, this area came under the jurisdiction of the United States.

an extensive reservation to the east of what was to become the executive order reservation of December 16, 1882. The Navajos were thereupon released from their internment and moved to the newly-created Navajo Indian Reservation. Added to those who had escaped internment there were then between twelve and thirteen thousand Navajos. By 1882 the population of the Navajos had grown to about sixten thousand.

The western boundary of the Navajo Indian Reservation was defined with precision in an executive order issued on October 29, 1878. This line was later to become the eastern boundary of the 1882 reservation. Additional land was added to the southwest corner of the Navajo reservation by another executive order issued on January 6, 1880. With this addition, the Navajo reservation amounted to about 11,875 square miles, or 8,000,000 acres.

Despite the vast size of the Navajo reservation at that time, this semi-arid land was considered incapable of providing support for all of the Navajos. Moreover, except for one or two places, the boundaries of the Navajo reservation were not distinctly marked. It is therefore not surprising that great numbers of the Navajos wandered far beyond the paper boundaries of the Navajo reservation as it existed in 1880. By 1882, Navajos comprising hundreds of bands and amounting to about half of the Navajo population had camps and farms outside the Navajo reservation, some as far away from it as one hundred and fifty miles.

The Navajos were originally of an aggressive nature, although not as warlike as the Apaches. It was because they had become embroiled in a series of fights with white men that they were banished to Fort Sumner in 1863. By 1882, however, they had curbed their hostility to the Government and to white men and, in general, were peaceably disposed, except for their proclivity to commit depredations against the Hopis, as described below.

Desert life made the Navajos sturdy, virile people, industrious and optimistic. They were also intelligent and thrifty. Some Navajos established farms which held them to fixed locations. In the main, however, they were semi-nomadic or migratory, moving into new areas at times, and then moving seasonally from mountain to valley and back again with their livestock. This required them to live in rude shelters known as "hogans," usually

built of poles, sticks, bark and moist earth. It was their practice to keep these hogans on a permanent basis and return to them when it was practicable.

The first suggestion that a reservation be created which would include any of the lands here in question came from Alex G. Irvine, United States Indian Agent at Fort Defiance, Arizona Territory. On November 14, 1876, he recommended to John A. Smith, Commissioner of Indian Affairs of the Department of the Interior, that a reservation of fifty square miles be set apart for the Hopis. He based this recommendation on the necessity of protecting the Hopis from Mormon pressure from the west and south, and of providing more living space for the Hopis because of increasing Hopi and Navajo population.

Nothing came of Irvine's recommendation. On May 13, 1878, William R. Mateer, then United States Indian Agent for the Hopis, proposed that a reservation extending at least thirty miles along the Colorado River be set apart for the Hopis. This proposal drew no reaction from the Washington office. In his annual report of August 24, 1878, Mateer recommended the removal of the Hopis to a point on the Little Colorado River which was outside of what later became the 1882 reservation. His stated reason for making this suggestion was that the Navajos were spreading all over that country within a few miles of the Hopis and were claiming, as their own, the only areas where there was water and which were worth cultivating.

A year later Commissioner Ezra A. Hoyt asked Mateer to make a further report concerning the latter's reservation suggestion, but Mateer resigned before making such a report. On March 20, 1880, Galen Eastman, Mateer's successor as Hopi Indian Agent, wrote to R. E. Trowbridge, the then Commissioner, recommending that a reservation be set aside for the Hopis. His proposal was for a reservation forty-eight miles east to west and twenty-four miles north to south, embracing the Hopi villages. Eastman expressed the view that the Hopis needed a reservation because the settlement of Mormons in the vicinity was "imminent."

Nothing came of Eastman's recommendation and another two years were to pass before the matter of establishing a reservation in this area again became active. On March 27, 1882, J. H. Fleming, then the Hopi Indian Agent, wrote to the Secretary of the Interior recommending a small reservation for the Hopis.

Such a reservation, he urged, should include the Hopi pueblos, the agency buildings at Keams Canyon, and sufficient lands for agricultural and grazing purposes. Fleming stated that such a reservation was needed to protect the Hopi Indians from the intrusion of other tribes, Mormon settlers, and white intermeddlers.

On July 31, 1882, United States Indian Inspector C. H. Howard wrote to the Secretary recommending that a new reservation be set aside for the "Arizona Navajos," and for the Hopis whose seven villages would be encompassed within the proposed new reservation. On October 25, 1882, Howard made an extensive report to the Secretary renewing his suggestion that a joint reservation be established for the western Navajos and Hopis.[5]

The reservation envisioned by Howard was a much larger one than Fleming had in mind. His stated reason for including the Arizona Navajos in the reservation was to contain, within newly-created boundaries, the great number of Navajos who were then roaming far beyond their then established reservation. His reasons for including the Hopis were to protect them from encroaching white settlers and from being "constantly overridden by their more powerful Navajo neighbors."[6]

None of the recommendations for the establishment of a new reservation were immediately acted upon. In the meantime, however, Fleming wrote to the Commissioner under date of October 17, 1882, advising that he had expelled one Jer. Sullivan from the Hopi villages as an intermeddler. At the same time he requested authority for soldiers to expel E. S. Merritt, another white intermeddler. Since, however, the Hopis did not have a reservation, forcible removal of intermeddlers could not be ordered, and Fleming was so advised.

On November 11, 1882, Fleming reported that he was having further difficulties with Sullivan, and stated that he would resign if a way could not be found to evict Sullivan and Merritt from

[5]A third Howard report, renewing this recommendation, was not completed until December 19, 1882, and so could not have been considered in drafting the Executive Order of December 16, 1882.

[6]Howard's assertion that the Hopis were "constantly" overridden by the Navajos is borne out by authentic reports extending back to 1846. In that year and in 1850, 1856, 1858, and 1865, civil and military officials reported instances in which Navajos had trespassed upon Hopi gardens and grazing lands, seized and carried away livestock, and committed physical violence.

the Hopi villages. On November 27, 1882, Commissioner Hiram Price sent a telegram to Fleming, asking him to describe the boundaries "for a reservation that will include Moquis villages and agency and large enough to meet all needful purposes and no larger. . . "

Fleming responded by letter dated December 4, 1882, specifying, as boundaries of the proposed reservation, the lines which were later described in the Executive Order of December 16, 1882. The proposed reservation thus described was much smaller than had been suggested in the joint-reservation proposal submitted by Howard.[7] At that time there were about eighteen hundred Hopis and about three hundred Navajos living within the boundaries recommended by Fleming.[8]

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[7]In his letter of December 4, 1882, Fleming said, among other things:

"The lands most desirable for the Moquis, & which were cultivated by them 8 or 10 years ago, have been taken up by the Mormons & others, so that such as is embraced in the prescribed boundaries, is only that which they have been cultivating within the past few years. The lands embraced within these boundaries are desert lands, much of it worthless even for grazing purposes. That which is fit for cultivation even by the Indian method, is found in small patches here & there at or near springs, & in the valleys which are overflowed by rains, & hold moisture during the summer sufficient to perfect the growth of their peculiar corn.

* * * * * * * *

"In addition to the difficulties that have arisen from want of a reservation with which you are familiar, I may add that the Moquis are constantly annoyed by the encroachments of the Navajos, who frequently take possession of their springs, & even drive their flocks over the growing crops of the Moquis. Indeed their situation has been rendered most trying from this cause, & I have been able to limit the evils only by appealing to the Navajos through their chiefs maintaining the rights of the Moquis. With a reservation I can protect them in their rights & have hopes of advancing them in civilization. Being by nature a quiet and peaceable tribe, they have been too easily imposed upon, & have suffered many losses."

[8]As revealed by extensive archeological studies, there were over nine hundred old Indian sites, no longer in use, within what was to become the executive order area but outside of the lands where the Hopi villages and adjacent farm lands were located. Most of these were Navajo sites. Tree ring or dendrochronological studies show that of a total of 125 of these Indian sites within the executive order area for which data was successfully processed, the wood used in the structures was cut during a range of years from 1662 to 1939. A considerable number of these

On December 13, 1882, Commissioner Price wrote to H. M. Teller, Secretary of the Interior, transmitting a draft of an executive order in the exact form of the order issued three days later. In his letter of transmittal Price pointed out that the Hopis, then said to comprise "1813 souls" had no reservation, as a result of which it had been found impossible to extend them needful protection from white intermeddlers.

On December 15, 1882, Secretary Teller forwarded the papers to President Arthur, stating that he concurred in the Commissioner's recommendation. The handwritten executive order of President Arthur, setting aside the reservation, was issued on the next day, the boundaries being depicted in the map which is a part of this opinion. On December 21, 1882, Price sent a telegram to Fleming advising:

> "President issued order, dated sixteenth, setting apart land for Moquis recommended by you. take steps at once to remove intruders."[9]

The circumstances which led to the issuance of this executive order, as stated above, demonstrate that the primary purpose was to provide a means of protecting the Hopis from white intermeddlers, Mormon settlers, and encroaching Navajos. It was thus intended that the Hopis would be provided such means of protection immediately upon the issuance of the executive order, no further proceedings by way of Secretarial settlement or otherwise being required. Hence the background facts fully confirm the opinion stated above, based on the language of the order, that the Hopis acquired immediate rights in the 1882 reservation upon issuance of the December 16, 1882 order.

The right and interest thereby gained by the Hopis was the right to use and occupy the reservation, the title to the fee

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specimens were cut and presumably used in structures prior to 1882. There is no convincing evidence of any mass migration of Navajos either into or out of the executive order area at any time for which the tree ring data were available.

[9]This was confirmed by a letter of the same date in which the Commissioner stated, among other things:

> "I now transmit to you a copy of the order, by which you will see that your recommendations, as contained in letter to this office, dated December 4th (instant), have been followed as regards the boundaries of the same."

remaining in the United States. *Spalding v. Chandler*, 160 U.S. 394, 402-403. This included the right to the mineral resource as well as surface use and occupancy.[10] The right was in the Hopi Tribe for the use and benefit of individual members thereof.[11]

The right of use and occupancy then gained by the Hopi Indian Tribe extended to the entire area embraced within the December 16, 1882 reservation, and was not limited to the parts of that reservation then used and occupied by them. As indicated in Commissioner Price's telegram of November 27, 1882, the reservation was intended to "include Moquis villages and agency and large enough to meet all needful purposes and no larger. . ." Future as well as then present needs of the Hopis were thus intended to be met, thereby precluding a construction of the executive order which would confine Hopis to the area which they then actually occupied.

Whether the right thus acquired by the Hopis to use and occupy the entire reservation was lost or impaired by subsequent inaction or abandonment on the part of the Hopi Indian Tribe is a matter to be discussed at a later point in this opinion. Likewise to be discussed below is the extent to which, if any, the right of use and occupancy acquired by the Hopis on December 16, 1882 was thereafter diminished in quantum or altered in character by action, if any, of the Secretary in permitting other Indians to settle on the reservation, or by reason of any other occurrence or course of events.

The right of use and occupancy gained by the Hopi Indian Tribe on December 16, 1882, was not then a vested right. As stated in our earlier opinion, an unconfirmed executive order creating an Indian reservation conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President. Such use and occupancy may be terminated by the unilateral

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[10]Opinion of Acting Solicitor, Department of the Interior, filed June 11, 1946, 59 I.D. 248, dealing specifically with the executive order reservation of December 16, 1882. See, also, *McFadden v. Mountain View M. & M. Co.*, 9 Cir., 97 Fed. 670, 673, reversed on other grounds, 180 U.S. 533; *Gibson v. Anderson*, 9 Cir., 131 Fed. 39; 34 Opinions of the Attorney General, 182, 189; Federal Indian Law, 1958 edition, pages 648-652. The applicable principles are discussed in *United States v. Walker River Irr. District*, 9 Cir., 104 F.2d 334.

[11]*United States v. Shoshone Tribe*, 304 U.S. 111, 116; *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307.

action of the United States without legal liability for compensation. The Hopis were therefore no more than tenants at the will of the Government at that time. See *Healing v. Jones*, 174 F. Supp. 211, 216, and cases there cited. No vesting of rights in the 1882 reservation occurred until enactment of the Act of July 22, 1958.

Rights and Interests Acquired by Navajos on December 16, 1882

Unlike the Hopis, the Navajos are not named in the Executive Order of December 16, 1882. Therefore if they have any rights of use and occupancy in the reservation such rights must have been acquired under the provision of that order reading: "and such other Indians as the Secretary may see fit to settle thereon."

The words "may see fit" connote a future contingency, to be fulfilled only by an exercise of discretion. Those words thus contemplate the exercise of Secretarial authority which did not come into existence until the executive order was issued.

In the exercise of that authority the Secretary might, sometime after December 16, 1882, permit to be settled in the reservation Navajos who were actually residing there when the executive order was issued. Conceivably the Secretary could, in his discretion, relate those rights back to the day the executive order was issued. But, in any event, rights thereby acquired would be predicated upon the act of the Secretary on some date subsequent to December 16, 1882, in granting such permission, nunc pro tunc or otherwise, and not upon the force and effect of the executive order independent of such Secretarial action.

Defendant appears to concede that any right or interest the Navajos have in the 1882 reservation must arise from Secretarial action pursuant to the "such other Indians" clause of the executive order.[12]

But it also appears to be defendant's position that the administrative intent in using this "such other Indians" clause was to

[12] In defendant's reply brief, for example, it is stated that "The 'Navajo interest' in the Executive Order area necessarily arises from Secretarial settlement thereon of Navajo Indians, members of the Navajo Tribe." Later in the same brief defendant states: "We are quite certain the court will find that the Navajo Indians are those referred to in the Executive Order as having been 'settled thereon by the Secretary of the Interior pursuant to such Executive Order.'"

grant immediate rights of use and occupancy to Navajos then living in the reservation area. Thus defendant expresses the view, in its objections to plaintiff's proposed findings of fact, that the recommendations of C. H. Howard for the establishment of a joint Western Navajo-Hopi reservation were accepted. Defendant also calls attention to official expressions in later years that it was the intention in creating the reservation to set aside the lands for the use and occupancy of the Hopi Indians and for the use and occupancy of the Navajos then living there, in addition to permitting the continued settlement of Navajos within the discretion of the Secretary.

There seems to be an inconsistency between defendant's concession that any rights the Navajos have in the 1882 reservation result from the "such other Indians" clause of the executive order, and his contention that the purpose in issuing the order was to grant immediate rights to Navajos as well as Hopis. As previously pointed out, the "such other Indians" clause could only be effectuated by subsequent Secretarial action. Its only effect was to provide the Secretary with authority to take future action, in his discretion, permitting Indians other than Hopis to settle on the reservation. Indians whose rights in the reservation are dependent upon future official acts of discretion can hardly be said to have gained immediate rights by virtue of an executive order which authorizes the exercise of such discretion.

But aside from this seeming inconsistency, and apart from the conclusion expressed above that the words of the executive order disclose no such intention, the extrinsic evidence refutes, rather than supports, the argument that it was intended by the executive order to grant Navajos immediate rights in the 1882 reservation.

As stated above, J. H. Fleming had recommended a small reservation for the exclusive use of the Hopis while C. H. Howard had recommended a very much larger reservation for the joint use of the "Arizona Navajos," and the Hopis. Defendant contends that since the Secretary was expressly authorized to settle other Indians in the reservation, Fleming's recommendation for an exclusive Hopi reservation was necessarily rejected. Defendant also calls attention to the fact that in his letter of December 21, 1882, the Secretary advised Fleming that his recommendations "as regards the boundaries" had been accepted,

nothing being said of Fleming's recommendations that the reservation be for the exclusive use of the Hopis. It is argued from these two circumstances that Howard's recommendation for a joint Arizona Navajo-Hopi reservation was accepted.

In our view, the conclusion reached by defendant is not warranted by the circumstances relied upon. The most significant fact in connection with the creation of the 1882 reservation is that the boundaries described in the executive order were those which Fleming supplied in response to the instruction: "for reservation that will include Moquis villages and agency and large enough to meet all needful purposes and no larger." Had administrative officials intended to create a joint Western Navajo-Hopi reservation they would not have confined it to an area which Fleming thought was no larger than necessary for the Hopis, and rejected the larger area recommended by Howard for a joint reservation.

It is true that Fleming's recommendation for an exclusive Hopi reservation was not completely accepted. It was rejected to the extent that the Secretary was authorized to settle other Indians in the reservation in the future. This explains why Fleming was advised that his recommendations "as regards the boundaries" had been accepted, no like advice being given with respect to his recommendation for an exclusive Hopi reservation. But this falls far short of establishing an intention to accept Howard's recommendation for a joint reservation from the outset. The latter possibility is negated not only by the fact that Fleming's restricted area recommendation was accepted, but by the fact that the Navajos were not named in the executive order.

It is probable that Howard's recommendations had nothing whatever to do with the insertion of the "such other Indians" clause in the executive order. This was a customary provision in executive orders of that period. In 1 Ex. Order 195, I Kappler 916, dated April 9, 1872, a reservation was set aside for named bands of Indians in Washington Territory, "and for such other Indians as the Dept. of Interior may see fit to locate thereon." Between that date and December 16, 1882, as shown by plaintiff's exhibit No. 263, nine additional orders, setting aside reservations for named Indian tribes, contained a similar provision.

On the other hand, when it was decided to give immediate reservation rights to specific Indians then residing in the area,

in addition to the named Indians for whom the reservation was principally created, officials knew how to make this clear in an executive order. Just four days prior to the issuance of the order of December 16, 1882, an executive order was issued establishing the Gila Bend reservation. It was therein recited that the reservation was created for the ". . . Papago *and other Indians now settled there,* and such other Indians as the Secretary of the Interior may see fit to settle thereon." (Emphasis supplied.) The treaty of 1838 with the New York Indians, 7 Stat. 500, provided that the Senecas should have, "For themselves and their friends, the Cayugas and Onondagas, residing among them, the easterly part of the tract set apart for the New York Indians."[13]

There is another circumstance, extrinsic to the 1882 executive order itself, which tends to indicate that it was not the purpose to grant immediate rights to the Navajos by issuance of that order. By the Navajo treaty of 1868, 15 Stat. 667, the Navajos agreed that they would relinquish all right to occupy any territory outside the reservation thereby created, retaining only the right, under limited circumstances, to hunt on contiguous unoccupied lands.

The Navajos were released from this undertaking to the extent that specifically described additions were made to the original Navajo reservation by executive orders issued on October 29, 1878, and January 6, 1880.[14] Had it been the intention of the administration to grant Navajos, by issuance of the 1882 order,

[13]A similar technique has been employed since 1882, when it was intended that Indians other than the primary tribe were to have immediate rights. In II Executive Order 7, IV Kappler 1003, dated July 17, 1917, the Kaibab Indian reservation was established, "For the use of the Kaibab and other Indians now residing thereon, and for such other Indians as the Secretary of the Interior may locate thereon."

[14]The Navajos were similarly released from this treaty obligation on several occasions subsequent to December 16, 1882, but again, in each case, specific reference was made to the Navajo Indians and their then-existing reservation. On May 17, 1884, President Chester A. Arthur withheld from sale and settlement as a reservation for Indian purposes, lands that later were added to the Navajo Indian Reservation. Act of June 14, 1934, 48 Stat. 960. Similar action was taken by President William McKinley on January 8, 1900, and by President Theodore Roosevelt, on November 14, 1901, both of these additions to the Navajo Indian Reservation being effectuated by the Act of June 14, 1934, *supra.* On November 9, 1907, the Navajo Indian Reservation was again enlarged by executive order.

an immediate further release from their treaty obligations, we would expect to find some mention of the Navajos in that order.

We have not lost sight of defendant's reliance upon official expressions of opinion, made at various times, subsequent to 1882, with regard to the administrative intention in creating that reservation. In its briefs defendant relies upon two statements of this kind. One of these was the statement of Superintendent Leo Crane in his report of March 12, 1918. The other was the statement of Acting Solicitor Felix N. Cohen, in his opinion of June 11, 1946, 59 I.D. 248, 252. But there were also many other similar official expressions to the effect that it was the intention, in establishing the 1882 reservation, to give Navajos then living in the described area, rights of use and occupancy co-equal with those granted the Hopis.[15] On the other hand there are a number

[15]The principal statements of this kind were the following: (1) In his 1912 annual report, Leo Crane, then Superintendent of the Hopi Reservation, stated: ". . . These Navajos were permitted to remain on the reservation, having a right of occupancy, when the reserve was created by executive order of December 16, 1882."; (2) in his letter of June 22, 1914, addressed to the Commissioner of Indian Affairs, Superintendent Crane stated: ". . . Those Navajoes who resided on the reserve at that time (December 16, 1882), had a right of occupancy, and it is not understood that this right has diminished."; (3) in his letter of July 7, 1915, addressed to the Commissioner, Superintendent Crane stated: ". . . Owing to the language of the Executive Order creating the reservation in 1882, it would seem there is no authority for the deportation of Navajoes, nor is there any location to which they might be deported. . . ."; (4) in the report made by Inspector H. S. Traylor to the Bureau of Indian Affairs, on June 6, 1916, he stated: ". . . The Navajos were the occupants of at least a part of this territory before the Executive Order was made, and there is no doubt but that they are entitled to a part at this time . . ." (In this report Traylor incorrectly paraphrases the executive order as follows: ". . . it was done for the exclusive use of the Hopis and such other Indians as may be residing there . . ."); (5) in a report dated March 12, 1918, from Superintendent Crane to the Commissioner of Indian Affairs, the Superintendent stated: "The language of the executive order of 1882 practically guarantees to those Navajos or other Indians residing on Moqui at that time equal rights with the Hopi."; (6) on May 18, 1920, during the testimony of Robert E. L. Daniel, Superintendent of the Hopi Reservation, before a subcommittee of the Committee of Indian Affairs of the U. S. House of Representatives, the following colloquy occurred: "Mr. Daniel. The reservation was created by Executive order for the Hopi Indians, and the usual 'jigger' in all matters pertaining to Indian reservations slipped in in the form of 'such other Indians that might belong on the reservation,' (an erroneous paraphrase of the order). Mr.

Carter. That lets the Navajo in? Mr. Daniel. That lets the Navajo in. It happened at that time that there were practically as many Navajos on the reservation as Hopis," (this was not a correct statement, as there were about eighteen hundred Hopis and three hundred Navajos in the reservation area in 1882).; (7) under date of July 26, 1924, the chief of the land division of the Department of the Interior, sent a memorandum to the inspection office of that department, in which it was said: ". . . the order of 1882 would seem to include them (the Navajos), or at least those who were there at that time."; (8) in a letter dated September 29, 1924, sent by Charles H. Burke, Commissioner of Indian Affairs, to several Hopi leaders, it was stated: "It is believed this language (of the executive order) was intended to permit Navajo Indians who had lived on the reserve for many years to continue there."; (9) in a report dated May 12, 1928, sent to the Commissioner of Indian Affairs by C. E. Faris, District Superintendent of the Southern Pueblo Agency at Albuquerque, New Mexico, it was said: ". . . with the establishment of the reserve in 1882, the Department and the President, not unmindful of the rights of the Navajos as well as the Hopis, created the reservation for the use and occupancy of the Hopis and 'such other Indians as the Secretary may see fit to settle thereon,' and since the Navajos were there in possession, control, and use of vast range areas, the provision was warranted."; (10) in a letter dated September 24, 1932, sent to Otto Lomavitu, then President of the Hopi Council at Oraibi, C. J. Rhoads, then Commissioner of Indian Affairs, said: "This language 'for the use and occupancy of the Moqui and such other Indians, etc.' was purposely used so as to not only provide a reservation for the Hopi (Moqui) Indians but also to take care of a large number of Navajo Indians who were then living within the Executive Order area, as reports on which the Executive Order withdrawal was based indicate that the purpose of the withdrawal was for the joint benefit of the Hopi and Navajo Indians living within the area."; (11) in a memorandum to the Secretary, dated December 20, 1932, Commissioner Rhoads said: ". . . At the time of making the above Executive Order withdrawal it was indicated by the Government field officers in their reports that in addition to the Hopi Indians a considerable number of the Navajo Indians were living within the area withdrawn. Hence, the language used in the Executive Order was designed to take care of the rights of both groups of Indians in their joint use and occupancy of the lands."; (12) in a conference between leaders of the Hopi Indians and officers of the Office of Indian Affairs, held on April 24, 1939, John Collier, Commissioner of Indian Affairs, stated that ". . . the Hopi-Navaho Reservation [was] set aside by the President for the Hopis and other Indians resident there. . . ."; (13) in an opinion rendered to the Secretary on June 11, 1946, Felix S. Cohen then acting solicitor of the department, stated: ". . . it was the intention in creating the reservation to set aside the lands for the use and occupancy of the Hopi Indians and for the use and occupancy of the Navajos then living there, and to permit the continued settlement of Navajos within the area in the discretion of the Secretary . . ."

of official expressions to the contrary effect.[16]

In our view, such comments and expressions of opinions, even though coming from officials of the same agency in the course of their administrative duties, are not competent evidence of what other officials, back in 1882, intended when they framed and obtained issuance of the executive order. Probably none of those commenting officials had access to as complete a record concerning the events and circumstances leading up to issuance of the 1882 order as is now before this court. As indicated by the words which they used in making these comments, several of these officials were apparently unaware of the exact language of that order. We must draw our own conclusions based on our understanding of the facts as they have been presented in this case,

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[16]The principal statements of this kind are: (1) On October 10, 1888, R. V. Belt, then Chief of the Indian Division, advised the Secretary that the reservation ". . . comprises no lands set apart for the Navajoes . . ."; (2) on the same date the Secretary of the Interior, William F. Vilas, wrote to the Secretary of War, giving the identical advice; (3) on December 18, 1890, the Commissioner wrote to the Secretary: "It is very desirable that the Navajos should be forced to retire from the Moqui reservation . . ." (4) on February 10, 1912, C. F. Hauke, then Second Assistant Commissioner of Indian Affairs, writing to Leo Crane, then Superintendent of the Hopi Indian School at Keams Canyon, Arizona, said: "In considering the proposition for a division of the reservation, due weight should be given to the fact that the reservation was created primarily for the Moqui (Hopi) Indians, though it was also provided that the Secretary of the Interior might in his discretion settle other Indians thereon."; (5) during hearings before a subcommittee of the Committee on Indian Affairs of the U. S. House of Representatives, held on December 6, 1917, E. B. Merritt, Assistant Commissioner of Indian Affairs, stated: ". . . we have not considered seriously the question of excluding the Navajos from the area set aside primarily for the Moqui Indians."; (6) in a report, dated July 25, 1930, sent by H. H. Fiske, field representative of the Indian Service, to the Commissioner, commenting upon Superintendent Crane's report of March 12, 1918, in which it was stated that the executive order "practically guarantees to those Navajos or other Indians residing on Moqui at that time, equal rights with the Hopis," Fiske said: ". . . There is nothing in the wording of the Executive Order to indicate that time of residence had anything to do with the question; but that the Secretary of the Interior might introduce such Indians, of tribes other than the Hopis, as he might see fit to do from time to time."

on our analysis of the language of the order, and on our view of the applicable law.[17]

Our conclusion, based on all of the considerations discussed above, is that neither the Navajo Indian Tribe nor any individual Navajo Indians, whether or not living in the reservation area in 1882, gained any immediate rights of use and occupancy therein by reason of the issuance of the executive order.

Settlement of Navajos in the 1882 Reservation

It follows from what has just been said that if the Navajos have acquired any right or interest in that reservation it must have been because, subsequent to December 16, 1882, they were settled therein pursuant to the applicable provision of the executive order of that date.[18] The exact language of the provision in question reads as follows: ". . . and such other Indians as the Secretary of the Interior may see fit to settle thereon."

In discussing the meaning of this provision, defendant directs attention to the character of the occupancy which must be shown to exist in order to establish that "other" Indians were settled in the reservation. Indians other than the Hopis are to be regarded as settled in the reservation, he argues, if they use and occupy such lands for residential and incidental purposes, in Indian fashion, and if such use and occupancy is of a continuing and permanent nature as opposed to a transitory or temporary occupancy.

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[17] These post-1882 official comments and opinions may be relevant to the entirely different question of whether Navajos were later settled in the reservation with the permission of the Secretary.

[18] It was theoretically possible for the Navajos to have acquired an interest in the reservation subsequent to December 16, 1882, by some other means, such as by Presidential or Congressional action. However, the Navajos make no claim of that kind, nor would the record support such a claim. Moreover, the Act of July 23, 1958, negates any such claim. In the opening language of that act it is declared that the lands are held in trust for the Hopi Indians "and such other Indians, if any, as heretofore have been settled thereon by the Secretary of the Interior pursuant to such Executive order." The statutory trust therefore is not for the benefit of any unnamed Indians who were not "settled" in the reservation pursuant to the "such other Indians" provision of the executive order.

In reaching this conclusion defendant applies, by analogy, the meaning which courts have attached to the terms "settlement" and "settled" as used in the Homestead Law, 43 U.S.C. § 162, 166.[19] He also likens the character of use and occupancy by "other Indians" contemplated by the executive order to that which must be found to exist in order to establish aboriginal Indian title.[20] Defendant thus seems to make the test exclusively one as to the character of the use and occupancy, no mention being made of the role the Secretary must play in order for "other Indians" to obtain rights as settled Indians.

Plaintiff, on the other hand, places the emphasis entirely upon the part the Secretary must play. He argues that however continuing and permanent the use and occupancy of other Indians may be, they cannot acquire rights in the 1882 reservation as "settled" Indians, unless the Secretary has, in the exercise of his discretion, "settled" them in the reservation. Plaintiff contends that neither the meaning attached to the terms "settlement" or "settled," as used in the Homestead law,[21] or the character of use and occupancy associated with aboriginal Indian title, is

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[19]The Supreme Court in *Great Northern Railroad Company v. Reed*, 270 U.S. 539, 545, speaking of the Homestead law, said: "The term 'settlement' is used as comprehending acts done on the land by way of establishing or preparing to establish an actual personal residence—growing thereon and, with reasonable diligence, arranging to occupy it as a home to the exclusion of one elsewhere." See also, *Anna Bowes*, 32 L.D. 331.

[20]In this connection defendant refers to statements concerning the kind of aboriginal use and occupancy which will constitute "Indian title," as set out in *United States v. Santa Fe Pacific Railroad Company*, 314 U.S. 339, 345; *Mitchell v. United States*, 34 U.S. 464, 486; *Alcea Band of Tillamook v. United States*, 103 C.Cls. 494, 558; and *Assiniboine v. United States*, 77 C.Cl. 347, 368. In the *Santa Fe* case, the court said, at page 345:

> "Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. If it were established as a fact that the lands in question were, or were included in, the ancestral home of the Walapais in the sense that they constituted definable territory occupied exclusively by the Walapais (as distinguished from the lands wandered over by many tribes), then the Walapais had 'Indian title' which, unless extinguished, survived the railroad grant of 1866."

[21]Plaintiff argues that the Homestead law refers to the act of the individual seeking the benefit of the law, no administrative official being called upon to "settle" anyone.

helpful in construing the words "to settle," as used in the Executive Order of December 16, 1882.[22] Plaintiff concedes that his research has thrown but little light on the question of what act the Secretary must perform to "settle" other Indians on the 1882 reservation, and believes defendant's research has been similarly unproductive.

We are of the opinion that neither the test as to the character of use and occupancy of "other" Indians, as suggested by defendant, nor the test as to whether the Secretary acted to "settle" other Indians, as suggested by plaintiff, is alone sufficient in determining whether "other" Indians have been "settled" on the 1882 reservation. In our view, Indians other than Hopis acquired rights in the 1882 reservation under the executive order provision in question if: (1) such Indians used and occupied the reservation, in Indian fashion, as their continuing and permanent area of residence, and (2) the undertaking of such use and occupancy, or the continuance thereof, if undertaken without advance permission, was authorized by the Secretary, exercising the discretion vested in him by the executive order.

The general principle just stated provides a starting point for our discussion. It does not dispose of all the legal problems to be encountered in determining whether the Secretary in fact settled any Navajos in the 1882 reservation. Nor does it provide any guidance as to what effect Secretarial settlement of Navajos, if any were settled, had on pre-existing Hopi rights in the reservation. These are questions which can best be dealt with as they emerge during the course of the following discussion.

The evidence is overwhelming that Navajo Indians used and occupied parts of the 1882 reservation, in Indian fashion, as their continuing and permanent area of residence, from long prior to the creation of the reservation in 1882 to July 22, 1958, when

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[22] Plaintiff contends that while Indian title as interpreted by the court with respect to Indian reservations has been determined to be the right of occupancy and use, no case has been found which makes the converse true, that such title can be created by merely using and occupying the land. Moreover, he in effect argues, the concept of aboriginal title no more than that of settlement under the Homestead law, involves administrative action, while under the Executive Order of December 16, 1882, such action is a specific requirement.

any rights which any Indians had acquired in the reservation became vested.[23]

The Navajo population in the reservation steadily increased during all of this period. In 1882 there were only about three hundred Navajos living in the area. By 1900 this had increased to 1,826. In 1911 the Navajo population was estimated to be two thousand, and by 1920 this had grown to between twenty-five and twenty-seven hundred. The Navajo population climbed to 3,319 by 1930, and to about four thousand by 1936. About six thousand Navajos were living within the reservation in 1951. By 1958, the Navajo population probably exceeded eighty-eight hundred.

The use and occupancy of the reservation area for residential purposes by a constantly increasing number of Navajos, is therefore definitely established, and we have so found. But the critical question is whether such use and occupancy was by authority of the Secretary, granted in the exercise of the discretion lodged in him by the executive order to "settle" other Indians on the reservation.

None of the twenty-one Secretaries of the Interior who served from December 16, 1882 to July 22, 1958, or any official authorized to so act on behalf of any of these Secretaries, expressly ordered, ruled or announced, orally or in writing, personally or through any other official, that, pursuant to the discretionary power vested in him under the executive order he had "settled" any Navajos in the 1882 reservation, or had authorized any Navajos to begin, or continue, the use and occupancy of the reservation for residential purposes.

In the absence of any order, ruling, or announcement of this kind, defendant produced evidence on the basis of which, he urged, such Secretarial act or acts of discretion should be implied. This evidence relates to such matters as the extent to which administrative officials acquiesced in the known presence of Navajos in the reservation and the reasons therefor; the extent to which Government assistance was rendered to Navajos in the reservation as compared to that rendered to Hopis and the rea-

[23] In *Healing v. Jones*, 174 F.Supp. 211, 216, we held that from the date of the enactment of the Act of July 22, 1958, 72 Stat. 402, the beneficiaries of the trust thereby created "had a vested interest therein capable of judicial recognition and protection."

sons therefor; and the issuance of official pronouncements concerning the respective rights of the Hopis and Navajos in the reservation and the officially-asserted basis for rights so recognized. Plaintiff produced counter evidence of the same general character.

We turn to a discussion of that evidence.

For a period of nearly six years following issuance of the executive order, the known presence of a relatively small number of Navajos in the 1882 reservation was neither condemned nor sanctioned by administrative officials. These Navajos were not officially labeled as interlopers and no effort was made to eject them from the reservation. On the other hand, they were not publicly recognized as having any rights in the reservation and they were provided with no assistance or supervision of the kind which, on a modest scale, was being supplied to Hopis.[24]

We conclude that nothing occurred during this initial period which would warrant the finding and conclusion that the Secretary had, by implication, settled Navajos in the reservation pursuant to the "such other Indians" provision of the 1882 executive order.

On September 20, 1888, Inspector T. D. Marcum reported to the Office of Indian Affairs that Hopis were complaining of Navajos "on their reservation," with flocks and herds, destroying Hopi crops and ruining their grazing lands. On September 26, 1888, Herbert Welsh, Corresponding Secretary of the Indian Rights Association, wrote to William F. Vilas, Secretary of the Interior. He told the Secretary of complaints he had received from Hopis concerning injuries inflicted upon them as a result of "the continual intrusions and depredations" of the Navajos.

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[24] In August, 1886, S. S. Patterson, then the Navajo Indian Agent, held a general council of Indians at Keams Canyon, within the 1882 reservation. Hopis representing five villages and thirty to forty Navajos living in the vicinity of Keams Canyon, attended this meeting. The Hopi representatives favored the establishment of a school at Keams Canyon, and promised to send sixty to seventy children from the villages. A few Navajos also said they would send their children to this school. Patterson reported this to the Washington office but the record does not indicate whether accommodation of Navajo children at this school was approved and, if so, whether any Navajo children attended during these first years. The school at Keams Canyon was opened in 1887.

Welsh suggested that a military force be sent to the area for the purpose of holding a council with the Navajos to inform them that the depredations must cease.

These two reports were turned over to R. V. Belt, Chief, Indian Division, for consideration. On October 10, 1888, Belt sent a memorandum to the Secretary expressing approval of the recommendation that a military expedition be sent to the area. He concluded this memorandum with these words:

> "The Moquis reservation was established by Executive Order of December 16, 1882, for the Moqui and such other Indians as the Secretary of the Interior may see fit to settle thereon. It comprises no lands set apart for the Navajoes and no Navajoes have been settled thereon by the Department."

On the same day on which this memorandum was written, it was received by Secretary Vilas. Later the same day, he wrote to the Secretary of War requesting that a company of troops be dispatched to the area with instructions "to remove all Navajo Indians found trespassing with their herds and flocks on the Moqui reservation and to notify them that their depredations must cease and that they must keep within their own reservation." In this communication Secretary Vilas also made the identical statement that Belt had made to the effect that no Navajos had been settled in the reservation.

We do not agree with defendant that the Secretary's statement should be discounted because of the expedition with which he acted after receiving the memorandum from Belt. To the extent, however, that this statement represents an expression of opinion by the Secretary as to the meaning of the 1882 order, or as to what some previous Secretary did or did not do in the way of settling Navajos in the reservation, the quoted statement is not competent evidence. Our view as to this is identical with that expressed earlier in this opinion in discussing whether the Navajos gained rights in the reservation on December 16, 1882.

But Vilas had been Secretary of the Interior since January 16, 1888. His statement therefore represents the best possible evidence that between January 16, 1888 and October 10 of that year, when the statement was made, no Navajos were settled in the reservation by Secretarial authorization. We so find and conclude.

The military expedition which Secretary Vilas requested reached the reservation in December, 1888. Due to the fact that winter was coming on, Navajo movement in the area adjacent to the Hopis was at a minimum. Forcible removal of Navajo families at that time of year would also have caused great hardship. For these reasons the officers in charge of this expedition determined not to force an immediate evacuation. Instead, they confined their action to a show of force and a warning that depredations must cease.[25]

Officials in the Office of Indian Affairs were advised of this development and were apparently content to let the military proceed under the new plan. Defendant believes that, in view of this acquiescence, it should be inferred that the Secretary had impliedly settled these resident Navajos in the reservation.

We do not agree. Only a short time before, the Secretary had expressly stated that he had not settled any Navajos in the reservation. There were no official pronouncements during the months which followed indicating a change of position. The decision of the military against forcible ejection of Navajos was not based on any supposed rights the Navajos had acquired in the reservation by settlement or otherwise. This considerate treatment was professedly motivated, as Indian Office officials knew, by a desire to avoid inflicting hardships on Navajo families, where not immediately necessary to protect the Hopis. If there was any other motivation it was probably the desire to avoid antagonizing the aggressive Navajo Indian Tribe at a time when the Government was seeking to maintain peace with the Indians of the West.

In the summer of 1889, there were renewed complaints of Navajo encroachments upon the Hopis, the theoretical twelve-mile limit prescribed by Col. Carr apparently being disregarded by the Navajos. From the beginning to the end of 1890 there were further complaints of this kind. The Hopis living at Oraibi, the largest Hopi village, ceased sending children to the Keams

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[25]It was during this period that Col. E. A. Carr, commanding officer at Fort Wingate, New Mexico, wrote to Navajo Chief Sam Begody. The colonel asked Chief Begody to notify the Navajos in the 1882 reservation that they had no right to move nearer to the Hopi villages, and that they must move back and stay "at least twelve miles away from the Moquis. . . ."

Canyon school, partly because of the Government's failure to protect the Hopis from the Navajos.

In February, 1890, Commissioner T. J. Morgan instructed Charles E. Vandever, the Navajo Agent at Gallup, New Mexico, to immediately take energetic and proper steps, without endangering the peace, to keep the Indians ". . . within the limits of their reservation, and to return roving Indians to the reservation." The only Indians excepted from this order were those who had settled upon lands outside of their reservation for the purpose of taking homesteads. No Navajos had moved into the 1882 reservation for that purpose, because that area had not been opened for homesteading.

It follows that, under Commissioner Morgan's instructions, all Navajos then in the 1882 reservation were subject to removal. They could not have been removed if they had been settled in the reservation by Secretarial authority. Hence the instructions indicate that from June 10, 1889, when Morgan became Commissioner, to February, 1890, when the instructions were issued, no Navajos had been settled in the 1882 reservation by Secretarial authority.

On December 16, 1890, special agent George W. Parker sent a telegram to the Commissioner stating that a company of soldiers should be sent at once to remove "trespassing" Navajos from among the Hopis, and to arrest rebellious Oraibi Hopis who refused to send their children to the Keams Canyon school. The Commissioner telegraphed General McCook at Los Angeles and, on December 17, 1890, a military expedition was sent on its way.[26] On December 22, 1890, the Commissioner sent instructions to Parker to cooperate with the troops and school superintendent Ralph P. Collins "in such way as may be proper to eject the Navajos from the Moqui country to protect the Moquis from the former. . ."

The troops reached Keams Canyon on Christmas Eve, 1890, and shortly thereafter, with their use, the revolt of the Oraibi Hopis against the Keams Canyon school was broken. Winter being already well advanced, the Navajos were not on the move

[26]On December 18, 1890, the Commissioner made a full report of developments to the Secretary of the Interior, stating that "It is very desirable that the Navajos should be forced to retire from the Moqui reservation. . . ."

and Lt. Charles H. Grierson, in charge of the troops, reported that he saw no Navajo herds in the vicinity of the Hopi villages. Lt. Grierson apparently did not have instructions to carry out the Commissioner's plan to have Navajos ejected from the Hopi country. Instead, his instructions were to hold interviews with the Navajos and explain to them that they should cease molesting the Hopis.

Again, the Washington office apparently acquiesced in the decision of the military not to forcibly eject Navajos from the 1882 reservation. But, as in the case of the similar attitude adopted by the Commissioner's office in 1888, we do not believe that implied Secretarial settlement of Navajos is to be inferred from such acquiescence.

There were apparently two reasons why it was decided not to use force on this occasion, neither of which was predicated upon the view that the Navajos had rights in the reservation, however acquired. One of these was that, until the 1882 reservation boundary lines were distinctly marked, Navajos could not be blamed for entering that area. The other was that every effort was being made at this time to avoid antagonizing the Navajo Indian Tribe. Thus Lt. Grierson was instructed by Capt. H. K. Bailey, at Los Angeles, that he should be very "guarded" in his action, especially towards the Navajos, "and under no circumstances, if it can be avoided, will any harsh measures be taken towards them at this time."[27]

Early in 1891, Parker, Navajo Agent David Shipley, School Superintendent Collins, and Thomas V. Keam, a pioneer of the area, decided that the most feasible way of meeting the immediate problem was to prescribe a circular boundary around the Hopi villages, having a radius of sixteen miles, within which the Navajos were instructed not to enter. They proceeded to do this, marking the circular boundary by mounds and monuments.

The Commissioner was advised of this plan, being told that both the Hopis and Navajos were agreeable thereto. The Commissioner apparently acquiesced in the arrangement, although it was never expressly confirmed by the Washington office. This

[27] That the Washington office shared this reluctance to rile the Navajo Indian Tribe at this particular time is evidenced by the directions Parker received from the Commissioner on December 22, 1890, ". . . to exercise proper care and tact not to inflame the minds of the Navajos and endanger an outbreak with them. . . ."

1891 line is referred to in the record and briefs as the "Parker-Keam" line. In what turned out to be a colossally over-optimistic statement, the Commissioner, on January 30, 1891, reported to the Secretary that the affairs between the Hopis and Navajos in the vicinity of Keams Canyon "have been brought to a satisfactory conclusion."

The significance which defendant draws from establishment of the so-called Parker-Keam line, is predicated on the fact that it operated to assure Navajos residing outside that line but inside the 1882 reservation that they would not be disturbed. We are asked to infer therefrom that, by implication, the Secretary settled Navajos in the 1882 reservation, but outside of the Parker-Keam line.

If this circumstance were considered independently of all the other events of the period, such an inference might be warranted. But immediately prior thereto the Commissioner had ordered the removal of Navajos and had only acceded to less stringent measures out of considerations unrelated to any claim of right in the Navajos. During this same period the Government was rendering substantial assistance to Hopis in the reservation but none at all to resident Navajos unless a few Navajo children were then attending the Keams Canyon school.

Moreover, the significance to be attached to the establishment of the Parker-Keam line must be judged not alone in the setting of circumstances which then existed, but also in the light of subsequent events. There are many instances in the long history of this controversy in which an interpretation of a particular occurrence, perhaps justified by immediately surrounding circumstances, proves unwarranted when considered in a broader context. As we shall shortly see, administrative action in the years immediately following establishment of the Parker-Keam line negates the view that any Navajos had previously gained rights in the reservation by Secretarial settlement or otherwise.

We therefore conclude that practical considerations, unassociated with any official recognition of Navajo rights, dictated acquiescence in the attempt to solve the problem by means of the Parker-Keam line. Up to early 1891, no Secretary of the Interior had settled any Navajos in the 1882 reservation.

Early in 1892, administrative officials put into effect a plan to allot lands to individual Indians in the reservation. While,

under this plan, Navajos in the reservation were not permitted to be uprooted in order to allot lands to Hopis, neither were they permitted to receive allotments themselves. No Indian was allowed an allotment unless his father or mother was a Hopi.[28] This distinction between rights accorded Hopis and Navajos is explainable only on the hypothesis that the Navajos in the reservation were not then settled Indians within the meaning of the 1882 executive order.

Several years were then to pass before there would be other events of significance. In 1899, the superintendent of schools at Keams Canyon complained of Navajo depredations and urged that the Navajos be returned to the Navajo reservation. The Washington office, however, decided that nothing should be done "as the Navajoes have always trespassed upon the Moqui resn. . . ." The following year, rejecting a proposal that traders on the reservation not be permitted to do business with Navajos, the Commissioner said that it was not practical or fair to ask traders to keep the "trespassing" Navajos out by refusing to trade with them.

It would appear that if the Navajos were then "trespassers" in the reservation, as they were authoritatively labelled, they were not settled Indians within the meaning of the 1882 order. The described Government inaction is not necessarily inconsistent with that label. Refusal to eject Navajos at this time may well have been motivated by the same considerations which led to acquiescence in the military decision against ejectment in prior years. Refusal to restrict the traders in the manner proposed was specifically attributed to the hardship this would place upon traders rather than any rights which had been acquired by the Navajos.

Again, several years elapsed before there were other occurrences relevant to the question under discussion. In Part II of the Indian Department Appropriation Act of March 1, 1907, 34 Stat. 1015, under the heading "Arizona" (34 Stat. 1021), the Secretary of the Interior was authorized "to allot lands in severalty to the Indians of the Moqui Reservation in Arizona, in such quantities as may be for their best interests. . . ." It was further provided that such allotments would be subject to the provisions

[28] This first allotment project was discontinued in the fall of 1894, without any allotments having been approved.

of the General Allotment Act of February 8, 1887, 24 Stat. 388-391.

The then acting Commissioner apparently construed the words "Indians of the Moqui Reservation," as used in the 1907 act, to include Navajos then located in the reservation who intended to remain there and who desired to receive allotments. Thus, on February 25, 1909, he instructed field officials to allot lands in the reservation to such Navajos. He further advised, however, that Navajos living in the reservation who declined to accept allotments "can be removed from the reservation." In conveying these instructions, the acting Commissioner made reference to the "such other Indians" provision of the Executive Order of December 16, 1882, stating that this provision provided "ample authority" for the instructions which were given.

The clear intendment of these instructions, given by the authorized representative of the Secretary, is that Navajos then living in the reservation who intended to make it their permanent homes, and who indicated a willingness to accept allotments, were thereby "settled" in the reservation pursuant to the authority vested in the Secretary under the executive order. All other Navajos living in the reservation, however, without regard to length of residence or intention to make the reservation a permanent home, were subject to removal and therefore were not "settled" at that time.

Approximately three hundred Navajos residing on the 1882 reservation indicated a willingness to accept allotments, and received allotments subject to approval. In 1911 this second allotment project was abandoned, and none of the allotments to Navajos or others was approved. These three hundred Navajos must nevertheless be regarded as "settled" Indians, since the only Navajo permanent residents who were denied that status under the acting Commissioner's ruling of February 25, 1909, were those who were unwilling to accept allotments.

It is not ascertainable from this record who these three hundred Navajos were; which, if any, were still living on July 22, 1958, and residing in the reservation; or which of them, if any, had descendants living in the reservation on the latter date and, if so, who were such descendants. It is therefore not possible, on this record, to find that any Navajos residing in the reservation on July 22, 1958, derived rights of use and occupancy by

reason of the fact that, in the years 1909 to 1911, the Secretary had settled three hundred unidentified Navajos in the reservation.

There are several reasons why, as we find and conclude, the Secretarial settlement of three hundred Navajos in the reservation in connection with the 1907-1911 allotment project, did not effectuate a Secretarial settlement of the Navajo Indian Tribe in the 1882 reservation. These reasons are: (1) only three hundred of some two thousand Navajos then living in the reservation were settled in this manner; (2) the only Navajos who may be deemed to have been settled at that time were those who agreed to accept allotments, and the acting Commissioner ruled that Navajos who declined to accept allotments "can be removed from the reservation"; (3) the purpose of the allotment system being to remove lands from communal ownership and place them under individual ownership (see Federal Indian Law, Department of the Interior, page 773), the fact that the Government indicated a willingness to allot lands to Navajos (these allotments were never approved) does not tend to show a purpose to settle the Navajo Indian Tribe; and (4) events subsequent to 1911 show that the Navajos were not administratively treated as a "settled" tribe.

It was during this second allotment period that administrative personnel of the Office of Indian Affairs began to speak of Navajo "rights" in the reservation. Writing to the Commissioner on January 24, 1911, Hopi Superintendent A. L. Lawshe said: "As I understand the matter the two tribes now have substantially equal rights which should be preserved." C. F. Hauke, the Second Assistant Commissioner, making reference to this statement in a letter to an official of the Indian Rights Association, commented: "The Superintendent's report indicates that he appreciates the fact that the Navajos and Moquis have equal rights on the reservation. . . ."

Neither Lawshe nor Hauke indicated what they believed to be the source of the asserted "rights" of the Navajos. There is no indication that they regarded the Navajos as having been "settled" pursuant to the executive order. But if this inference is warranted, it still is not helpful in the absence of an indication that the officials were reporting contemporaneous administrative action, as distinguished from expressing an opinion as to past action. Finally, there is no evidence that these views were then accepted or shared by the Secretary or the Commissioner.

We conclude that these statements of Lawshe and Hauke are without significance on the question of whether Navajos were "settled" in the reservation. Nor were there, with the exception of the allotment instructions referred to above, and action thereunder, any other events during this second allotment period, from 1907 to 1911, from which it may reasonably be inferred that Navajos were "settled."

During the seven-year period from 1911 to the enactment of May 25, 1918,[29] the view first emerged in official circles that, by virtue of the "such other Indians" provision of the Executive Order of December 16, 1882, Navajos then living on the reservation, and their descendants, had acquired rights of use and occupancy. This opinion was first expressed by Leo Crane, then superintendent at Keams Canyon, in his annual report for 1912. It was repeated by him in 1914, 1915 and 1918, and the same view was expressed by Inspector H. S. Traylor in a report dated June 6, 1916.

These expressions of opinion would have significance only if they manifested contemporaneous action by the Secretary, or his authorized representative, settling Navajos in the reservation pursuant to the authority reserved in the executive order. But neither Crane nor Traylor were shown to have authority to act for the Secretary in such matters. It is therefore not necessary for us to determine whether they were purporting to do so, or whether they were merely expressing their personal opinions as to the legal effect of the executive order, or as to past Secretarial acts of settlement.

It was also during this seven-year period, that suggestions for an actual and permanent division of the reservation between Hopis and Navajos, with marked boundary lines, were first advanced. Superintendent Lawshe had, in fact, made such a suggestion on February 14, 1911, just before abandonment of the second allotment project. A similar suggestion was made on November 20, 1911, by Leo Crane. On February 10, 1912, Second Assistant Commissioner Hauke advised Crane that the general

[29]The Act of May 25, 1918, 40 Stat. 570, 25 U.S.C., § 211, prohibited the creation of any Indian reservation or the making of any additions to existing reservations in the States of New Mexico and Arizona, except by Act of Congress.

problem was under consideration. In his 1912 report, and again in 1915, Crane reviewed this suggestion. A somewhat similar suggestion was made by Inspector Traylor on June 6, 1916.

As a result of suggestions made by then Congressman Hayden at a Congressional committee hearing held in December, 1917, Crane was instructed to investigate the desirability of dividing the 1882 reservation. He reported on March 12, 1918, agreeing with Traylor that the reservation should be divided, the Navajo part, however, to be only for the use of Navajos who resided in the reservation in 1882 and their descendants.

Had the suggestions of Lawshe, Crane and Traylor for a division of the reservation been accepted by the Secretary or Commissioner, the inference would be permissible that the Navajos were recognized by them as having rights of use and occupancy in the reservation. But there is no indication that these recommendations received acceptance above the level of field personnel.

A third development during this period which requires comment has to do with suggestions that Navajos be removed from the reservation. On May 26, 1914, H. F. Robinson, Superintendent of the Land Division of the Department of the Interior, wrote to the Commissioner recommending that the Navajos be moved from the 1882 reservation to available lands to the south. Crane, who was asked to submit his views concerning this proposal, recommended against it.

In his report of June 6, 1916, Inspector Traylor spoke of the territory occupied by Navajos as "rightfully" belonging to the Hopis, and suggested that some Navajos might be persuaded to move to the west and south of the 1882 reservation. He would then set aside the area within the reservation, vacated by the Navajos, for the Hopis for a period of ten years, with the provision that if they did not use and occupy it, the Navajos again be permitted to take it over.

There is nothing in the record to indicate that either Robinson's or Traylor's suggestion for removing Navajos received acceptance in Washington. The fact, however, that Robinson's recommendation resulted in a request for a report from Crane, is some indication that the Commissioner's office did not then regard the proposal as legally precluded. If the Secretary or Commissioner had then held a very firm conviction that Navajos were present on the reservation as of right, it is doubtful if they

would have called upon a field official to report on the proposal to remove the Navajos.

During this seven-year period from 1911 to 1918, the Navajos on the reservation received very little assistance from the Government, while the Hopis, as in the past, received substantial aid. On June 22, 1914, Crane stated, in a report to the Commissioner, that for thirty years the Government "has lavished its help upon the Hopi and has done practically nothing for the Navajo on this reserve. . ." In a report dated March 12, 1918, he stated that thirty years of agency effort had been devoted almost entirely to the Hopis, the Navajos only being given implements. He added: "The Government since 1868 has neither sought to educate or rule them [Navajos]. . . ."

The events of the seven years from 1911 to 1918, reviewed above, provide no factual basis for the inference that, during that period, the Secretary "settled" Navajos on the 1882 reservation. In fact there is no indication that, during this period, the Secretary or Commissioner recognized Navajos as having any rights in the reservation, whether as "settled" Indians or otherwise. That the Navajos were actually regarded by them as without any such rights is indicated not only by the fact that a proposal to remove Navajos was seriously considered, but by the difference in treatment accorded Hopis and Navajos on the reservation with respect to the rendering of Government assistance.

During the nine-year period which followed, ending with the enactment of March 3, 1927,[30] there were further official expressions of opinion concerning the status of Navajos in the 1882 reservation.

At a Congressional Committee hearing held in May, 1920, Hopi Superintendent E. L. Daniel erroneously quoted the "such other Indians" provision of the executive order,[31] and stated that this "usual jigger . . . lets the Navajos in. . . ." Daniel also made the incorrect statement to the committee that, in 1882, "there were practically as many Navajoes on the reservation as Hopis."

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[30]On that date 44 Stat. 1347, 25 U.S.C. § 398d was enacted. Under this statute, changes in the boundaries of reservations created by executive order, proclamation, or otherwise for the use and occupation of Indians were prohibited, except by Act of Congress, with an exception not here applicable.

[31]Daniel quoted the provision as reading: "such other Indians that might belong on the reservation."

On July 26, 1924, Marschalk, Chief of the Land Division, answering an inquiry from the Commissioner as to the status of the Navajos on the reservation, replied:

> "It does not appear that the Navajos have at any time been especially authorized by this Department to occupy and use any part of the Moqui Reservation, but they have simply been allowed to remain by sufferance, although as before stated, the order of 1882 would seem to include them, or at least those who were there at that time."

As we said with regard to the somewhat similar expressions of Crane and Traylor, these statements by Daniel and Marschalk would have significance only if they manifested contemporaneous action by the Secretary or his authorized representative, settling Navajos in the reservation. But, as in the case of Crane and Traylor, neither Daniel nor Marschalk were shown to have authority to act for the Secretary in such matters. These latter statements, as in the case of the former, therefore do not aid us in resolving the question under discussion.

On September 29, 1924, an official as high as the Commissioner of Indian Affairs for the first time expressed an official view to the effect that Navajos had rights of use and occupancy in the reservation. This was, in fact, the first of thirteen instances during the twenty-year period from 1924 to 1944, when a Commissioner made an official statement or ruling which expressly, or by necessary implication, recognized Navajos as having rights in the 1882 reservation.

Without doubt the Commissioner of Indian Affairs had authority to exercise the discretion vested in the Secretary of the Interior to "settle" other Indians in that reservation.[32] It therefore becomes necessary to determine whether these statements by the Commissioner, to the effect that Navajos had rights in the reservation, and the administrative action or inaction with which they were associated, considered separately or together as a developing course of conduct, warrant the conclusion that the Secretary had, in the implied exercise of his discretion, and

[32] See 25 U.S.C., § 2, *Rainbow v. Young*, 8 Cir., 161 Fed. 837. In one of these thirteen statements (the one dated February 7, 1931), the Secretary of the Interior joined. In another, dated October 27, 1941, the Assistant Secretary of the Interior joined.

pursuant to his reserved authority under the 1882 executive order, settled Navajos in the reservation.

The statement of September 29, 1924, was made in answer to a protest which Hopi leaders had made against the plan to convert the Keams Canyon facilities into a school for Navajo children residing in the reservation. Referring to the "such other Indians" provision of the executive order, Commissioner Charles H. Burke said: "It is believed this language was intended to permit Navajo Indians who had lived on the reserve for many years to continue there."

For the reasons previously indicated, this statement is not competent evidence of the meaning of the 1882 executive order, or that a previous Secretary of the Interior had settled Navajos in the reservation. But since the "such other Indians" provision is not self-executing, and since the statement was made in justification of the Commissioner's concurrent act in providing schooling for resident Navajo children at Keams Canyon, the statement and act, considered together may have been intended to manifest implied settlement of Navajos at that time.

It is true that the Commissioner's statement insofar as it undertook to explain the intention of those who issued the executive order, is erroneous. As already stated in this opinion, the "such other Indians" provision was inserted in the order without any particular intent with regard to Navajos. Nor in framing that order was there any intent to limit the Secretary's authority to settle "other Indians," to Navajos who "had," by 1882, "lived on the reservation for many years. . . ," as Burke erroneously stated.

But if Commissioner Burke did thereby exercise the discretionary power to settle other Indians, the fact that he did so in favor of Navajos in the mistaken belief that this was the designed purpose of the "such other Indians" provision, is immaterial. We are not concerned with the motivation for the exercise of such discretion, or whether the result was good or bad.

In one respect, however, there appears to be an inconsistency between what the Commissioner said and what he did. By his statement he seems to have indicated, in effect, that he was settling in the reservation Navajos who had lived therein for many years prior to 1882. But he was apparently, at the same time, making the school facilities at Keams Canyon available

to all resident Navajo children without regard to the number of years their families had lived in the reservation. This is but the first of several instances to be related in which the Commissioner, while verbally seeming to indicate a limited exercise of the discretionary power in favor of Navajos, sanctioned administrative action consistent with a much broader exercise of such power.

It is not necessary to reach a conclusion based on this 1924 incident as to how this seeming inconsistency is to be resolved. Nor is it, for that matter, necessary to reach a firm conclusion based on this one incident, that any Navajos were settled in the reservation pursuant to the "such other Indians" provision of the executive order.

It is sufficient at this point in the opinion to observe that the 1924 statement and the surrounding circumstances have some tendency to indicate that some Navajos were then settled in the reservation pursuant to an implied exercise of authority under the executive order. It must be left to subsequent events, as hereinafter discussed, to reveal whether this initial tendency of the evidence is to be confirmed or undermined, and to accurately appraise the extent to which, if any, the discretionary power was exercised.

On March 31, 1926, Senator Ralph H. Cameron wrote to the Commissioner requesting comment concerning a proposal which had come to him from four Hopi chiefs that the President or Congress act to make the 1882 reservation "an entire Hopi reserve," and requiring Navajos residing therein to move "to their own reservation." Replying under date of April 13, 1926, Commissioner Burke referred to the "such other Indians" provision of the executive order,[33] and stated:

> ". . . There were undoubtedly some Navajo Indians, living on this land before the reservation was set apart; others have gone there since and settled. Their rights must be carefully considered."

In apparently recognizing resident Navajos as having rights in the reservation the Commissioner thus relied upon the "such other Indians" provision of the executive order. But the infer-

[33]The Commissioner incorrectly quoted this provision, stating that it read: "and such other Indians as the Secretary of the Interior may designate."

ence which might be drawn therefrom that he was thereby reporting contemporaneous administrative action pursuant to that provision is somewhat undermined by the use he made of the word "settled." The executive order contemplates settlement of other Indians only where the Secretary or his representative, in the exercise of discretion, consents thereto. Here, however, the Commissioner uses the term "settled" as if it required only action by the Navajos in taking up residence in the reservation.

The Commissioner's resistance to the proposal that the 1882 reservation be made an exclusive Hopi reservation, manifested in this letter, was borne out by contemporary administrative inaction. Neither the Secretary nor the Commissioner sought Presidential or Congressional authority to make this an exclusive reservation, nor did they take any steps to remove Navajos therefrom. Yet, when appraised in terms of comparative Government assistance rendered to resident Hopis and Navajos, the area was not then administered as if Navajos had equal rights with the Hopis.

During the years from 1918 to 1927, the Navajos in the reservation received slightly more Government assistance than formerly. But it was still insubstantial as compared to the aid received by the Hopis. Some sheep-dipping vats were installed for the joint use of the Hopis and Navajos. But in 1921, 563 out of 648 Hopi children were being served at five Government schools in the reservation, and at non-reservation schools, while only fifty of the six hundred resident Navajo children were being given schooling—all of them off the reservation. In 1926, however, the dilapidated facilities of a former period at Keams Canyon were reconstructed and put to use as a boarding school for Navajo children.

By the Act of March 3, 1927, 44 Stat. 1347, 25 U.S.C., § 398d, changes in the boundaries of reservations created by executive order for the use and occupation of Indians were prohibited, except by Act of Congress.

On November 19, 1927, Hopi Superintendent Edgar K. Miller wrote to the Commissioner suggesting that the 1882 reservation be divided between the Hopis and the Navajos. The Commissioner directed Miller to submit a more detailed report concerning this proposal. This further report was filed on January 16, 1928, Miller again recommending that the reservation be divided.

On April 13 of that year, Assistant Commissioner Merritt requested Chester E. Faris, District Superintendent at the Southern Pueblo Agency, Albuquerque, New Mexico, to make a careful investigation and full report concerning the proposal for a division of the reservation. Faris submitted this report on May 12, 1928, recommending against any division of the reservation. The proposal then rested in abeyance until March 14, 1930, when Commissioner Rhoads wrote to Faris, and on April 16 to H. J. Hagerman, special Indian commissioner, requesting them to recommend what action should be taken to resolve the Hopi-Navajo controversy.

While these studies were in progress, Hopi Superintendent Miller wrote to the Commissioner transmitting a petition signed by a number of Hopis, setting out their land claims. Replying to Miller under date of July 17, 1930, the Commissioner quoted the "such other Indians" provision of the 1882 order, and stated:

> ". . . it has always been considered that the Navajos have the right to use part of the reservation."

This reference to the "such other Indians" provision, as support for the view that Navajos have rights of use and occupancy in the reservation, again has some tendency to indicate a contemporaneous exercise of the discretionary power thereby conferred. While there is reference in this statement to what the past view was, it purports also to represent the view of the then Commissioner. Such tendency as this Commissioner's statement has to establish a contemporary settling of Navajos is not diminished by the described setting in which it was made. A division of the reservation between Hopis and Navajos was under active consideration. Concurrently with this statement the Hopi proposal for ejectment of the Navajos was expressly rejected.

On November 20, 1930, Hagerman and Faris submitted the report which had been requested of them in March and April of that year. They recommended that a part of the reservation, consisting of about 438,000 acres and including the Hopi villages and adjacent lands, be set aside and fenced for the exclusive use of the Hopis. It was their proposal that after these fences were built, the Hopis and Navajos should be told that the Hopis must keep inside the fence, and the Navajos outside, as far as grazing or agriculture or other occupancy was concerned. The Hopis,

however, would have the right to drive their cattle "through the Navajo area" to the railroad.[34]

Hagerman and Faris submitted a general description, stated in miles, directions, and natural monuments, for the area which they proposed be set aside for the Hopis within the 1882 reservation. They suggested, however, that if the proposal was accepted in principle, a detailed reconnaissance of the lines as approximately proposed be made with a view of a thorough examination of the terrain so as to find the best location for the fence.[35]

In this report Hagerman and Faris did not indicate why they thought the Navajos residing in the 1882 reservation had such standing that a large part of the area should be set aside for their use.

On February 7, 1931, Commissioner C. J. Rhoads and Secretary of the Interior Ray Lyman Wilbur, joined in a letter to Hagerman, accepting the recommendation that the 1882 reservation be divided. "We are of the opinion," they stated, "that there should be set aside and fenced for the exclusive use of the Hopis a reasonable and fair area of land." These two officials stated that it had for years been the hope of the department that the Hopi and Navajo Indians would become so friendly and cooperative as to enable them to live in the same country without any jurisdictional or other differences. It was now their reluctant conclusion, however, that real amalgamation was virtually impossible, and that it was therefore desirable to designate separate districts for the use of each group.

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[34] In this connection it was further stated, in the Hagerman report: ". . . At the same time they [Hopis] should be enjoined that they must respect the fenced area and if they do not they will be punished to the full extent of the law. It should be made clear to them that these areas are set aside merely for the use of the Hopis, and that in no way does it mean that the Government's passing upon the areas so set aside as lands to which the Hopis have any specific proprietary right. Nor should it be definitely indicated that there may not in the future be alterations or changes in the districts set aside for the use of the respective tribes."

[35] It was stated in this report that a few Navajos resided within the area proposed to be reserved for Hopis, and that a few Hopis resided outside of those lines. A few other Hopis, while residing within the reserved area, occasionally grazed cattle outside that area. Hagerman and Faris also stated that a good deal of the area adjacent to the proposed fence lines "is actually not even now much used by either the Hopis or Navahos."

The Commissioner and Secretary indicated that they were "disposed to accept" the boundary designations proposed by Hagerman and Faris. But they also directed that field studies be undertaken with a view of being able to designate the lines specifically "when the time comes."

Unlike the statements of previous Commissioners to the effect that resident Navajos had rights of use and occupancy in the 1882 reservation, no statement of this kind was made in the Commissioner's and Secretary's letter of February 7, 1931. That they did recognize resident Navajos as then having such rights is implicit, however, in their acceptance of the proposal to fence the reservation, thus setting aside a large share of the area for the exclusive use of the Navajos.

It remains to be determined whether such recognition of Navajo rights of use and occupancy necessarily establishes that the Secretary then and there, impliedly exercising the discretionary power vested in him under the 1882 executive order, "settled" resident Navajos in the reservation.

It is possible that the Commissioner and Secretary, giving heed to some previous official expressions of opinion, may have erroneously thought that the 1882 executive order, of its own force and effect, operated to confer rights of use and occupancy upon Navajos living in the reservation area in 1882 and their descendants. Or they may have thought that some previous Secretary had settled resident Navajos in the reservation.

But in their letter of February 7, 1931, the Commissioner and Secretary did not limit their implicit recognition of Navajo rights, to Navajos who were residing in the area in 1882, and their descendants, or to Navajos settled by a previous Secretary, and their descendants. They recognized all Navajos then living in the area, whether or not recent immigrants thereto, as having such rights.

In our view, this 1931 blanket and all-inclusive recognition of Navajo rights of use and occupancy is explainable on no other basis than that the Secretary, impliedly exercising the authority reserved to him in the executive order, was then and there settling in the 1882 reservation all Navajos then residing in that reservation.

On September 24, 1932, Commissioner Rhoads, replying to an inquiry from the Hopi Tribal Council, stated in effect that the

1882 reservation was created for the joint use of Hopis and Navajos.[36]

In a memorandum dated December 20, 1932, addressed to the Secretary, Commissioner Rhoads stated that when the Executive Order of December 16, 1882 was issued, there were, in addition to the Hopis, "a considerable number of the Navajo Indians . . . living within the area withdrawn." "Hence," Rhoads stated, "the language used in the Executive Order was designed to take care of the rights of both groups of Indians in their joint use and occupancy of the lands." Rhoads further advised the Secretary that the 1882 reservation "is considered to be withdrawn for the joint use of both groups of Indians and not for the exclusive use of the Hopi or Navajos. . ."

These statements of September 24 and December 20, 1932, were the first instances in which it was officially asserted that the 1882 order had the effect of establishing a joint reservation. For the reasons stated earlier in this opinion, this view was incorrect and, in any event, the Commissioner's opinion as to the meaning of the 1882 order is not competent evidence.

These statements by the Commissioner have no tendency to show that he was then, as the authorized representative of the Secretary, settling Navajos in the reservation. But neither did they operate to undermine the Secretarial act of settlement evidenced by the letter of February 7, 1931.

Administrative action between February 7, 1931 and December 20, 1932, indicates that the department wanted to extend the Navajo rights, so recognized, to Navajos moving into the area after February 7, 1931. Such action further indicates, however, that the department hoped to accomplish this by Congressional enactment, thus avoiding the necessity of exercising Secretarial discretion in settling future Navajo immigrants to the 1882 reservation. The reference here is to the course followed by the

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[36]The Commissioner stated on this occasion, that the "such other Indians" provision of the 1882 order was used

". . . to take care of a large number of Navajo Indians who were then living within the Executive Order area, as reports on which the Executive Order withdrawal was based indicate that the purpose of the withdrawal was for the joint benefit of the Hopi and Navajo Indians living within the area."

department in drafting the Navajo Indian Reservation Act, as reviewed in the margin.[37]

By the end of 1932 the department gave up the attempt to solve the problem legislatively. It submitted to Congress a new draft of the bill which was to become the Navajo Indian Reservation Act of June 14, 1934, 48 Stat. 960. In this draft all reference to the setting aside of a part of the 1882 reservation for the Hopis was deleted and it was specifically provided that the legislation would not affect the existing status of the 1882 reservation. On March 11, 1933, Commissioner Rhoads advised the Hopis that the new draft fully protected the rights of the Hopi Indians in the executive order area "and also those Navajo Indians who are already living therein."[38]

In our view the events and pronouncements of the period between February 7, 1931 and March 11, 1933, as reviewed above, warrant the inference, which we draw, that all Navajos who entered the 1882 reservation during that period were, by

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[37]In a second report, dated January 1, 1932, Hagerman furnished a more detailed description of the part of the 1882 reservation which it was proposed be set apart for exclusive Hopi use. On February 8, 1932, the department submitted to Congress a proposed bill defining the exterior boundaries of the Navajo Indian Reservation. The area so described included the 1882 reservation, but there was added a proviso to the effect that so much of the area included within the over-all boundaries as fell within a tract then particularly described ". . . be, and the same is hereby set aside as the Hopi Indian Reservation and should be held for the exclusive use and occupancy of the Hopi Tribe." The area so set aside would be the same as that which Hagerman had described in his 1932 report.

This proviso was later changed to eliminate the description of lands set aside exclusively for Hopis, and to provide that ". . . the Secretary of the Interior is hereby authorized to determine and set apart from time to time for the exclusive use and benefit of the Hopi Indians, such areas within the Navajo boundary line above defined, as may in his judgment be needed for the use of said Indians."

Under either form of the proviso it was thus contemplated that all Navajos entering the area in the future, as well as those who were settled therein as of February 7, 1931, would be entitled to take up occupancy in that part of the 1882 reservation outside of the proposed area of exclusive Hopi occupancy.

[38]Commissioner Rhoads added: ". . . it would appear that such of the Navajos as are permanently residing on the reservation would probably be entitled to share with the Hopis in any income from future mineral production."

implication, settled therein by Secretarial action. Therefore, as matters stood on March 11, 1933, all Navajos then residing in the reservation had rights of use and occupancy in the reservation, such rights arising from implied Secretarial settlement.

On June 18, 1934, Congress enacted the Indian Reorganization Act, 48 Stat. 984. Under § 6 of that act, the Secretary of the Interior was directed to make rules and regulations for the administration of Indian reservations with respect to forestry, livestock, soil erosion and other matters. Pursuant to the authority thus conferred, the Commissioner, with the approval of the Secretary, on November 6, 1935, issued regulations affecting the carrying capacity and management of the Navajo range.

By their terms, these new regulations purported to be limited to the "Navajo Reservation," which, under the Navajo Reservation Act of June 14, 1934, expressly excluded the 1882 reservation. These regulations provided a method of establishing land management districts with the assistance of the Navajo Tribal Council. They also provided a means of establishing, with the advice and consent of the Navajo Tribal Council, methods of range management "in order to protect the interests of the Navajo people."

Early in 1936, boundaries for these land management districts were defined. But notwithstanding the fact that the regulations providing for such districts were expressly limited to the Navajo reservation, and the Navajo Tribal Council was the only Indian group given a say in their determination, these districts embraced not only the Navajo reservation, but also all of the 1882 reservation.[39] Several such districts (Nos. 1, 2, 3, 4, 5 and 7) included parts of the Navajo reservation and part of the 1882 reservation.

District 6, which laid entirely within the 1882 reservation, was specifically designed to encompass the area occupied exclusively by Hopis. The record before us contains no metes and bounds description of district 6, as created in 1936. It is depicted in the map which is a part of this opinion and was probably

[39]In section 4 of Article VII, of the Constitution of the Hopi Indian Tribe, which became effective on December 14, 1936, when approved by the Secretary of the Interior, it is provided that "The administration of this article [relating to land] shall be subject to the provisions of section 6 of the Act of June 18, 1934." This Hopi consent came several months after the plan was put into operation in early 1936.

roughly equivalent to the area of exclusive Hopi occupancy as proposed and described in the second Hagerman report, referred to in footnote 37.

The full implications of this 1936 administrative action were to be revealed by later events. But it was already apparent that the 1882 reservation was thenceforth to be administered as if the Navajos had rights of use and occupancy in at least a large part of it.[40] Whatever opinion may be warranted concerning the way this was accomplished,[41] or as to its desirability, the administrative action itself, which was apparently acceptable to the Washington office, compels the inference that, by implied Secretarial action, all Navajos then residing in the 1882 reservation were settled therein.

From this time to October, 1941, all administrative action and pronouncements pertaining to the 1882 reservation tended to confirm the view just stated. It also indicates that as additional Navajos entered the area for permanent residence between 1936 and 1941, they were, by implication, settled therein by the Secretary pursuant to his reserved authority under the 1882 executive order.

Under the supervision of Allen G. Harper, a comprehensive plan for the administration of the Navajo and 1882 reservations was developed in early 1937. Under this plan, the Navajo Service was given supervision over all of the 1882 reservation except land management district 6, hereinafter referred to as district 6. Even as to that district, the land planning division of the Navajo Service was given supervision over construction and engineering projects and land planning. It was specifically provided that all administrative matters which affected the Hopi and Navajo Indians jointly were to be under the jurisdiction of the Hopi superintendent as to district 6, and under the jurisdiction of the

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[40]These land management districts are referred to in a letter dated May 15, 1936, from Navajo General Superintendent E. R. Fryer to Commissioner John Collier. In this letter Fryer stated that Hopi Superintendent Hutton was in agreement with him that "the entire Hopi and Navaho Reservation" should be considered "as one super land management district."

[41]Failure to forthrightly declare that Navajos were being settled in the reservation; extension of Navajo range regulations to the 1882 reservation without statutory authority; and the failure to consult Hopis in formulating the land management district plan.

Navajo superintendent as to the other land management districts. The Harper plan was put into effect on July 1, 1937.[42]

From then until October, 1941, there was a wide variety of administrative actions and pronouncements confirming this administrative policy of recognizing Navajos as settled Indians.[43] Perhaps the most significant of these was the effort to make final adjustments in the boundaries of district 6 so that the district would contain all lands used or needed by the Hopis, and then to set aside that area as an exclusive Hopi reservation, leaving the remainder of the 1882 reservation for the exclusive use of the Navajos.

This effort got under way on July 13, 1938. On that date Commissioner Collier, meeting with Hopi leaders at Oraibi, Arizona, suggested that the Hopi and Navajo Tribal Councils select committees to negotiate with each other upon boundary matters. The Hopi leaders did not agree to this suggestion, whereupon Collier intimated that an effort to divide the reserva-

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[42]This was accomplished by the promulgation, on June 2, 1937, effective as of July 1, 1937, of comprehensive grazing regulations for the Navajo and "Hopi" reservations. Again, the regulations were approved by the Navajo Tribal Council, but the approval of the Hopis was not obtained and apparently not sought. The regulations provided, however, that

> ". . . only such part of these regulations shall be enforced on the Hopi Reservation as are not in conflict with provisions of the constitution, by-laws, and charter of the Hopi Tribe heretofore or hereafter ratified or any tribal action authorized thereunder: . . ."

[43]Among individual incidents of this kind are the following: On January 28, 1938, Navajo Superintendent Fryer, who appeared to have the approval of the Washington office in such matters, wrote to Hopi Superintendent Hutton stating that no Hopis were to move outside of district 6 who had not previously lived outside, and that no new Navajo families would move into district 6. Thereafter a Hopi could not move outside of district 6 without obtaining a permit. In a conference with the Hopi Tribal Council at Oraibi, Arizona, on July 13, 1938, Commissioner John Collier stated that this permit system had nothing to do with the reservation boundary, but was a part of the grazing regulations.

When Hopis found it necessary to travel to other parts of the 1882 reservation to obtain wood, they were required to obtain permits from the Navajo Service, just as were the Navajos residing in that reservation.

In a conference with Hopi leaders on April 24, 1939, Commissioner Collier stated that the 1882 reservation was set aside for the Hopis "and other Indians resident there. . . ."

tion would nevertheless be made. Studies were actually already in progress to determine the number of Navajos residing within district 6 as it then existed, and the number living within a proposed extension of that district. The study, which was being made by Gordon B. Page and Conrad Quoshena of the Department's Soil Conservation Service, also dealt with the number and location of Hopis residing outside that district.

A meeting of field officials to consider the district 6 boundary matter was held at Window Rock, Arizona on October 31, 1938. It was there agreed that an intensive survey should be made of the area then occupied by Navajos and Hopis, and that every effort be made to delineate the actual individual use of lands by the respective tribes. Page and Quoshena were designated to make this survey with the assistance of range riders. Page submitted his report in December, 1940.[44]

In November, 1939, C. E. Rachford, Associate Forester, U.S. Forest Service, Department of the Interior, was designated to head a commission to conduct a further field investigation. The commission was instructed to make recommendations concerning the boundaries of district 6, and the boundaries of an exclusive Hopi reservation. The Rachford studies got under way on December 4, 1939. On December 14, 1939, a field conference was held at Winslow, Arizona, at which the procedures to be followed in considering these boundary matters were agreed upon.

Rachford made his boundary report on March 1, 1940. He stated that over four thousand Navajos and nearly three thousand Hopis were then living in the 1882 reservation. Rachford expressed the view that due to the hostility and aggressiveness of the Navajos, the Hopis had been restricted to an area entirely too small for a reasonable expansion needed to meet the ever-increasing population.

Rachford recommended that the Hopis continue to use such agricultural areas then occupied by them outside district 6, stating that "even this is inadequate." He proposed that the boundary line of district 6, extended to include these agricultural lands, be marked and fenced. Under this plan, Navajos would be excluded from the enlarged district 6, and Hopis would be

[44]He reported that 2,618 Hopis and 160 Navajos were living within the boundaries of district 6 as it then existed.

forbidden to go outside that district, except for ceremonial purposes,[45] and to gather wood and coal.[46]

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[45]Throughout the entire 1882 reservation, and beyond, the Hopis had numerous ceremonial shrines, some of which they had maintained and visited for hundreds of years. These Hopi shrines were of two kinds, the Kachina shrines and the eagle shrines. The Kachina shrines were the same for all Hopi mesas and clans, but the eagle shrines belonged to one or the other of the clans of the different pueblos. Eagle shrines were associated with the collection of young eagles from the eagle nests in the cliffs, at least one eagle always being left in the nest. The hunting of eagles was accompanied by rituals involving the use of corn pollen and prayer sticks, conducted at a particular site before the young eagles were seized. The young eagles were then taken back to the villages, raised to a certain size when they were killed, and the feathers used for ceremonial purposes.

The Navajos as well as the Hopis had sacred places both within and without the 1882 reservation. These were, for the most part, eagle-catching shrines, but the Navajos probably had less need than the Hopis for the use of eagle feathers in their ceremonials.

[46]Since the earliest times, Hopis had found it necessary to travel to distant places in the 1882 reservation in order to obtain fire wood and building timber. On December 16, 1922, the Hopi and Navajo agencies had entered into a cooperative agreement governing the cutting and gathering of wood and timber. On December 20, 1932, Commissioner Rhoads had recommended that a "proportionate" area within the 1882 reservation be designated for the exclusive use of the Hopis, and that a "fire wood reserve" be set aside for them.

In August, 1933, Commissioner Collier had rejected a request that the Hopis be permitted to cut timber within the San Francisco Mountain area outside of the 1882 reservation. He stated that yellow pine as well as pinon and juniper was available in the Black Mountain country, within the 1882 reservation, "which is much more accessible and will meet their needs." In the report of Range Examiner Joseph E. Howell, Jr., dated April 16, 1934, it was stated that, for the Hopis, "Some provision must be made for fuel wood, house timbers, and other miscellaneous wood products."

In Navajo Superintendent Fryer's memorandum of August 25, 1937, he had stated: "Hopi Indians can go outside district 6 for wood. We shall, however, attempt to set aside an area somewhere adjoining district 6 for the exclusive use of the Hopi Indians." At the Oraibi meeting held on July 14, 1938, Commissioner Collier had suggested that his proposed boundary negotiating committee ". . . prepare the description of . . . any timber and wood privileges that are needed for the Hopis, with a view of negotiating for any needed protection or privilege. . ."

No exclusive wood-cutting area for the use of Hopis was ever set aside. Instead, they were placed under the same permit system as were the Navajos when it was necessary to seek wood in that part of the 1882 district embraced within district 4. Despite this permit system,

The land management district boundary changes recommended by Rachford in this report would result in adding 21,479 acres to district 6, increasing the total acreage for that district from 499,248 to 520,727. While the Navajo and Hopi superintendents asked for clarification of some of Rachford's recommendations, they were, in the main, acceptable to administrative field officials. A draft of order was then prepared which would effectuate the Rachford recommendations.

On October 9, 1940, the Commissioner submitted this draft to the Secretary of the Interior for approval. In this draft it was recited that, subject to stated exceptions, the Hopi Indians "shall have the right of exclusive use and occupancy" of that part of the 1882 reservation therein described in metes and bounds. This description conformed to the Rachford boundary proposal as modified by agreement between the Hopi and Navajo superintendents.

This draft of order further provided that the part of the 1882 reservation situated outside of the above-described boundary "shall be for the exclusive use and occupancy of the Navajo Indians," subject to certain provisos.[47] In a letter to the Secretary which accompanied this draft, the Commissioner described the order as one to govern "the use rights of the Hopis and the Navajos within this area." It was explained that the exercise of coal, wood and timber rights under rules and regulations of the conservation unit serving the two jurisdictions would be continued. The Commissioner also stated that the Hopis were not to be disturbed in their use of certain areas within the Navajo jurisdiction for ceremonial purposes, and that, to enable this to

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agency officials continued to assure the Hopis that they had timber "rights" in the 1882 reservation extending beyond district 6. In a conference held in Washington, D.C., on April 24, 1939, Commissioner Collier told a committee of Hopi leaders that his office would "protect your timber right . . . to give access to the forests. . ."

[47]The first of these was to the effect that Navajos who established farming or grazing "rights" within the Hopi part prior to January 1, 1926, "shall have the right to remain occupants of the land they now use. . ." The second proviso was to the effect that Hopis who established farming or grazing "rights" outside of, but adjacent to, the Hopi part prior to January 1, 1926, ". . . shall have the right to continue occupancy and use of said lands, such rights to be determined by the Commissioner of Indian Affairs."

be done, permits would be issued to Hopis by the Navajo superintendent.

The draft of this order was submitted to the department's solicitor, Nathan R. Margold, who returned it to the Commissioner, disapproved, on February 12, 1941. The draft was disapproved because it would operate to exclude Hopis from the major part of the 1882 reservation without their assent. This would be illegal, the solicitor ruled, for the following reasons: (1) It was contrary to the prohibition against the creation of Indian reservations without statutory authority, contained in the Acts of May 25, 1918 (40 Stat. 570, 25 U.S.C., § 211), and March 3, 1927 (44 Stat. 1347, 25 U.S.C. § 398d); (2) it was in violation of the rights of the Hopi Indians within the 1882 reservation; and (3) it was not in conformity with the provisions of the Hopi constitution approved December 19, 1936.[48]

[48]The Indian Reorganization Act, enacted on June 18, 1934, 48 Stat. 984 (amended in respects not here material by the Act of June 15, 1935, 49 Stat. 378), provided in § 16 thereof a means whereby unorganized Indian tribes could establish a government for themselves. Prior to 1936, the Hopi Indians had never had an integrated tribal organization. In that year Hopi leaders determined to effectuate such an organization, utilizing the procedures set out in § 16 of the Indian Reorganization Act.

After several months of work, and with the assistance of a field representative of the Office of Indian Affairs, a constitution and by-laws were formulated. On October 24, 1936, the constitution and by-laws were adopted by a vote of 651 to 104 out of a total eligible Hopi vote of 1,671. The Secretary of the Interior approved these instruments on December 19, 1936, and they became effective on that day.

In holding that the proposed order dividing the 1882 reservation between Hopis and Navajos was not in conformity with the provisions of the Hopi constitution, the solicitor stated:

> "At least three provisions of the Hopi constitution bar action by the Department to limit the use and occupancy of the Hopi Indians to the proposed Hopi Unit without the assent of the Hopis. Article I defining the jurisdiction of the Hopi Tribe, provides that the authority of the tribe shall cover the Hopi villages 'and such land as shall be determined by the Hopi Tribal Council in agreement with the United States Government and the Navajo Tribe.' This provision was intended to provide, and clearly does provide, for the defining of a boundary to the land of the Hopis by agreement of all parties concerned. Article VI, section 1(c) embodies the provision in section 16 of the Indian Reorganization Act that organized tribes may prevent the disposition of their property without their consent. Article VII places in the Hopi Tribal Council supervision of farming and grazing upon the lands beyond the traditional clan and village holdings."

It will be observed that the solicitor's disapproval was not predicated on the view that the Navajos were without rights in the 1882 reservation. Rather it was based on the more limited premise that such rights as the Navajos had therein were not exclusive and could not be made exclusive without the assent of the Hopis.[49]

The Office of Indian Affairs thereafter redrafted the proposed order in an attempt to meet the objections of the solicitor. The revised draft, however, was also disapproved.[50] Further efforts were then made to draft an order pertaining to district 6 which would meet the solicitor's objections.

At the same time the proposed revision of boundary lines was further reviewed. This led to the preparation of a revised description which would result in a district 6 acreage of 528,823, as compared to the then existing acreage of 499,248, and Rachford's proposal of 520,727.

On September 4, 1941, the Office of Indian Affairs ruled that in view of the solicitor's opinion and the provisions of Article I of the Hopi Constitution, the proposed changes in the boundaries of district 6, as revised, should be submitted to the Hopi Tribal Council for consideration. This was done and the Hopi Tribal Council, while considering the matter, wrote to the Commissioner under date of September 23, 1941, propounding ten questions of fact and law.

It was stated earlier in this opinion, after reviewing events to early 1936, that all administrative action and pronouncements from then until October, 1941, tended to indicate continued Secretarial settlement of Navajos as they entered the 1882 reservation for purposes of permanent residence. We think this is

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[49]This is further demonstrated by the fact that the solicitor suggested in his opinion that if the Hopis would assent to grazing regulations which did not purport to cut down their reservation, there would be no objection ". . . to the Navajo superintendent issuing grazing permits to Navajos within the remainder of the 1882 reservation under the authority of the Secretary to settle non-Hopis within the reserve."

[50]In a letter dated April 5, 1941, Assistant Solicitor Charlotte T. Lloyd explained that the revised draft contained no provision for the consent of the Hopis to their exclusion from areas outside of district 6, and there was no provision for compensation for the disruption of the farming activity of the Navajos and Hopis who would be uprooted.

amply demonstrated by the preceding review of events between those two dates.

But, on October 27, 1941, in answering the questions propounded by the Hopi Tribal Council, Commissioner Collier made a statement which runs at cross purposes with the inference otherwise arising from the indicated administrative action of this 1936-1941 period.[51] In his reply the Commissioner stated, in effect, that the Hopis residing in the reservation had the right to the non-exclusive use and occupancy of the entire reservation except to the extent that they might voluntarily relinquish such rights. As for Navajo rights, the Commissioner wrote:

> "It is our opinion that only the individual Navajos residing on the 1882 Reservation on October 24, 1936, the date of the ratification of the Constitution of the Hopi Tribe by the Hopi Indians, and the descendants of such Navajos, have rights in the Reservation. Since, however, such Navajo Indians do not have a separate organization but are governed by the general Navajo tribal organization, Article I of the Hopi Constitution referring to the 'Navajo Tribe' means the general Navajo tribal organization."

The quoted statement has two significations—one with respect to Navajo rights recognized, and the other with regard to Navajo rights denied. Concerning the first of these facets, the Commissioner recognized that all Navajos who entered the 1882 reservation up to October 24, 1936, had rights therein. He could not have thought that these rights arose because the reservation was for the joint use of Hopis and Navajos, else those entering after October 24, 1936 would also have rights therein. It must therefore have been his view that Navajo rights acquired before October 24, 1936 were based on Secretarial settlement.

Commissioner Collier's opinion as to previous settlement of Navajos would not be competent evidence of that fact, except for the period during which he had served as Commissioner. He entered that office on April 21, 1933. Thus, the quoted statement fully confirms the inference we have drawn from other evidence, that all Navajos who entered between early 1933 and late 1936, obtained rights of use and occupancy by virtue of Secretarial settlement.

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[51]The Commissioner's letter of this date was approved on January 8, 1942 by Assistant Secretary of the Interior Oscar L. Chapman.

The other facet of the Commissioner's statement of October 27, 1941, amounts to a disavowal of any Secretarial settlement between October 24, 1936 and October 27, 1941, when the statement was made. This disavowal appears to be at variance with administrative action during the latter period. All Navajos living within the part of the 1882 reservation outside of district 6 were dealt with alike, regardless of time of entry, and would have been similarly protected by the proposed boundary orders which the department sought to effectuate. While the order was not promulgated this was not due to any view expressed, prior to October 27, 1941, that any Navajos then residing in the reservation were without rights, but on the view that their rights, tacitly recognized, were non-exclusive.

We find it unnecessary, however, to resolve this apparent conflict between what the Commissioner said at the end of the 1936-1941 period, and what he did during that period.[52] We may in fact assume that, because of this statement, Navajos entering during that period may not be regarded as settled by Secretarial action during those years. Subsequent events establish to our satisfaction that, if that be true, they along with all other Navajos who entered for purposes of residence prior to July 22, 1958, were nevertheless thereafter settled by the later implied action of the Secretary.[53]

We now proceed to review the circumstances and events which lead us to this conclusion.

After October 27, 1941, as before, the practice continued of denying grazing permits to Hopis for use of lands outside of district 6 except where they were able to show that they had historically and continuously grazed their sheep at least a portion of the year outside that district. The necessary effect of this restriction was to save non-district 6 grazing lands within the 1882

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[52]It is to be noted that the Commissioner's statement of October 27, 1941, was actually made in response to questions engendered by Hopi consideration of the proposed 1941 order which would have implicitly recognized that all Navajos living in the reservation in 1941 had rights of use and occupancy therein.

[53]In a report dated April 9, 1954, addressed to Orme Lewis, Assistant Secretary of the Interior, Commissioner Glenn L. Emmons expressed the opinion that it would be extremely difficult and expensive to determine the Navajos and their descendants who were in residence in the 1882 reservation on October 24, 1936.

reservation for exclusive Navajo use.[54] Such Navajo use was not limited to Navajos who had moved into the reservation prior to October 24, 1936.

On March 28, 1942, the Hopi Tribal Council passed a resolution disapproving the Rachford recommendations, as modified, for changes in the district 6 boundaries. On April 18 of that year Commissioner Collier instructed Willard R. Centerwall, associate regional forester at Phoenix, Arizona, to conduct a new study of the Hopi-Navajo boundary problem. Centerwall submitted his report on July 29, 1942. It carried the approval of Burton A. Ladd, then Superintendent of the Hopi "Reservation,"[55] and Byron P. Adams, Chairman of the Hopi Tribal Council.

Centerwall recommended a metes and bounds description for district 6 which would accomplish a substantial enlargement of that district. The acreage of district 6, applying his proposed description, would have been 641,797, as compared to the original 499,248, and Rachford's recommended 528,823.[56] The most im-

[54]Since approval of the Hopi Tribal Council had not been obtained, continuance of this practice was contrary to the legal advice provided by the solicitor in his opinion of February 12, 1941. While the solicitor had suggested that such a regulation might be promulgated, he also stated: "However, since the suggested regulation would not only regulate the use of the range but would exclude Hopis from the use, for grazing purposes, of the land outside the Hopi Unit, the regulations must have the assent of the tribe."

The significance of this ruling by the Commissioner is more far reaching than at first might be supposed, as indicated by the following inquiry directed to the Commissioner. On September 23, 1941, the Hopi Tribal Council asked the Commissioner: "If the proposed changes in the present District require the approval of the Hopi Tribal Council, why didn't the original District require the approval of the Council?" No direct answer was made to that question.

[55]In the grazing regulations which were approved June 2, 1937, effective as of July 1, 1937, the term "Hopi Reservation" was defined as follows:

> "For the purpose of these regulations District 6, as now established by the Navajo Service, shall constitute the Hopi Reservation until such time as the boundaries thereof are definitely determined in accordance with Article I of the Constitution and By-Laws of the Hopi Tribe."

[56]The Centerwall report contained a detailed "justification" for the boundary revisions recommended by him. In the four Navajo land management districts of the 1882 reservation (Nos. 3, 4, 7 and 5) which would lose land to district 6 under this proposal, approximately fifty-one Navajo families would have been adversely affected.

portant considerations which seem to have governed Centerwall in suggesting these revisions were the recognition of exclusive or predominant prior use and the full utilization of lightly loaded or idle grazing lands.[57]

Walter V. Woehlke, Assistant to the Commissioner, and J. M. Stewart, General Superintendent of the Navajo Service, raised objections to the Centerwall recommendations.[58] On September 23, 1942, however, the Hopi and Navajo superintendents joined in a letter to the Commissioner expressing the view that they could agree on adjustments in Centerwall's proposed boundaries for district 6. The Commissioner authorized them to proceed with that effort. The Hopi and Navajo superintendents then called a conference of field officials which was held at Winslow, Arizona on October 22, 1942.

Those attending the Winslow conference unanimously agreed to recommend Centerwall's proposed district 6 boundaries, with three modifications. The net effect of these modifications would be to reduce the district 6 acreage, as proposed by Centerwall, by 10,603 acres, leaving a district which would still be 131,946 acres larger than originally established. These boundary recommendations were submitted to the Commissioner on November 20, 1942. In doing so, the Hopi and Navajo superintendents suggested that policies be put into practice which would, in effect, divide the 1882 reservation between Hopis and Navajos, limiting the Hopis to the district 6 area and reserving the remainder for the exclusive use of the Navajos.[59]

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[57] Among other factors which Centerwall took into consideration were the following: (1) simplifying fencing by getting away from sharp breaks and escarpments; (2) establishing boundaries which are easy to follow and observe; (3) making room for overlapping in grazing use; (4) avoiding the necessity of "splitting" waters; (5) definitely setting out work areas for each Service; (6) simplifying livestock management and movement; (7) eliminating friction between Hopi and Navajo livestock operators; and (8) eliminating "split" administration.

[58] Woehlke, who had bitterly assailed the solicitor's opinion of February 12, 1941, also complained of Centerwall's reliance thereon, saying that Centerwall quoted from that opinion "with a noisy licking of the chops. . ." Referring to the solicitor's opinion in his memorandum commenting upon the Centerwall report, Woehlke said: "That memorandum was a fine example of the workings of the legalistic mind at its worst."

[59] This recommendation, however, contemplated certain exceptions from the over-all effect just stated. Navajos and Hopis who had established residence on either side of the district boundary would be permitted to

On April 24, 1943, the Office of Indian Affairs approved the boundaries, carrying capacity,[60] and statements of administrative policy, as recommended by the two superintendents on November 20, 1942. While the Hopi Tribal Council had approved the Centerwall recommendations it was apparently not asked to act on the boundary modifications proposed by the Hopi and Navajo superintendents on November 20, 1942. Nor was it asked to concur in their policy recommendations under which Hopis would, for the most part, be excluded from all of the 1882 reservation except district 6. In nevertheless approving these recommendations on April 24, 1943, and thereafter putting them in effect, the Office of Indian Affairs thus once again acted counter to the legal advice given by the solicitor on February 12, 1941.[61]

A considerable adjustment in place of residence and range use was thereafter made by both Hopis and Navajos in order to

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continue living there. Grazing "rights" would be established on the basis of past use. Rights to wood and timber on the whole reservation would be equal. Hopis would be assured the right to ingress or egress to areas "within Navajo jurisdiction" for ceremonial purposes.

This latter suggestion concerning access to Hopi shrines was consistent with similar recommendations which had been made over a long period of time. It appears to have been advanced first in December, 1931, in a letter from Assistant Commissioner J. Henry Scattergood to Senator Lynn J. Frazier. Like suggestions were made by Commissioner Rhoads in May and December, 1932; Navajo Superintendent Fryer in December, 1936; Commissioner Collier in July, 1938, April, 1939, and October, 1940; Walter V. Woehlke in December, 1939, and Rachford, in his report of March 1, 1940.

A specific provision to this effect was incorporated in the proposed Secretarial order prepared in 1937, but never signed. Article IV of the Hopi By-laws, adopted together with the Hopi Constitution in 1936, and still in effect, provides:

> "The Tribal Council shall negotiate with the United States Government agencies concerned, and with other tribes and other persons concerned, in order to secure protection of the right of the Hopi Tribe to hunt for eagles in its traditional territories and to secure adequate protection for its outlying established shrines."

[60] "Carrying capacity" refers to the ability of the land to support livestock. Carrying capacity was expressed in "sheep units," that is, the number of sheep which could be supported on the land for one year. It required five "sheep units" to support one horse or mule, four "sheep units" to support one head of cattle, and one "sheep unit" to support one goat.

[61] See note 54 above.

accommodate themselves to the new district 6 boundaries and the associated administrative policy of exclusive occupancy. Many Navajo families, probably more than one hundred, then living within the extended part of district 6, were required to move outside the new boundaries and severe personal hardship were undoubtedly experienced by some.

The events which transpired between October 27, 1941 and April 24, 1943, as reviewed above, warrant the inference, which we draw, that all Navajos who entered the 1882 reservation between October 24, 1936 and April 24, 1943, were settled thereon by implied Secretarial action. Thus, accepting at face value, the Commissioner's statement of October 27, 1941, to the effect that no Navajos entering the reservation after October 24, 1936 had gained rights in the reservation, those Navajos nevertheless gained rights of use and occupancy by subsequent implied Secretarial action.[62]

In 1944, Commissioner Collier made two statements to the effect that there had never been any formal Secretarial action settling Navajos in the 1882 reservation. In the first of these, made to Hopi leaders at Oraibi, Arizona on September 12, 1944, the Commissioner plainly intimated that there had been implied action of this kind during his term of office.[63]

In the second, made in a letter dated December 16, 1944, addressed to Dr. Arthur E. Morgan, the Commissioner stated that

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[62]The statement of October 27, 1941, purporting to exclude Navajos entering after October 24, 1936, from rights in the 1882 reservation, seems to be predicated on the notion that the Hopi Constitution, ratified on October 24, 1936, precluded Secretarial settlement of Navajos entering the reservation after that date. However, we find nothing in the Hopi Constitution which has the effect of cutting off the authority of the Secretary, provided for in the 1882 executive order, to settle "other Indians" in the reservation. Hence the October 24, 1936 statement, while here assumed to represent a disavowal of Secretarial settlement between October 24, 1936 and October 27, 1941, points to nothing which would bar subsequent Secretarial acts settling Navajos.

[63]The Commissioner said, on this occasion:

". . . Now, we don't need to debate as to the number of Navajos there were in the Executive order in 1882. I'll explain, whether any Navajos were there or not, they came. The Secretary made a report every year how many there were and he let them come in each year. In addition he went to Congress and asked for money for schools for both the Navajos and the Hopis on the Executive order, and they gave it to him. . . ."

there had never been any official Secretarial act settling Navajos in the reservation.

> ". . . but in the absence of any action to eject the Navajo Indians who had filtered into the area it was in time assumed that these Navajo were there with the consent of the Secretary."

In the quoted statement the Commissioner seems to be expressing his view as to the assumptions made by some previous official, and as to the legal status of Navajos in the reservation prior to his term of office, which began on April 21, 1933. So regarded, the statement is not, for reasons already stated, competent evidence on the question of settlement or non-settlement.

But the statement of Commissioner Collier of December 16, 1944 was also intended to reflect the assumption which he himself made in dealing with resident Navajos who moved into the reservation after he became Commissioner. Limited to those Navajos, the Commissioner's assumption that they were there with the consent of the Secretary, considered in the light of the concurrent administrative action reviewed above, establishes, in our opinion, that those Navajos were settled by the implied action of the Secretary under whom Commissioner Collier served.[64]

It is immaterial whether any such view with respect to Navajos moving into the reservation during his administration was prompted by a misconception as to assumptions made by previous officials, or as to the legal status of Navajos already residing in the reservation. Any such misconceptions would have relevance only as to the motivation of the Commissioner in settling newly-arrived Navajos, a matter which is not subject to judicial review.

In any event, nothing that Collier could say with respect to his own reasons for according Navajos equal status with Hopis in the reservation could restrict the authority of any subsequent Secretary or his authorized representative in settling Navajos. Events subsequent to the expiration of Collier's term of office on March 14, 1945, presently to be reviewed, amply demonstrate that all Navajos who entered the reservation prior to July 23, 1958, for purposes of residence, were settled therein by the implied action of the Secretary.

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[64] Harold L. Ickes was the Secretary of the Interior during all of the time that Collier served as Commissioner.

In February, 1945, fences were constructed by the Government along the revised district 6 line. The practice of excluding Hopi stockmen from areas outside of district 6 was continued, and with the aid of the fences, was more effectively enforced.

On June 11, 1946, Felix S. Cohen, then acting solicitor of the Department of the Interior, rendered an opinion with regard to the ownership of the mineral estate in the 1882 reservation. 59 Decisions of Dept. of Interior, 248. Stating that the department, on January 8, 1942, took the position that Navajos "would not be allowed to settle on the reservation after October 24, 1936,"[65] Cohen ruled that Navajos who had entered the reservation prior to that date were to be deemed settled therein pursuant to the 1882 executive order.[66]

Cohen predicated his October 24, 1936 cut-off date on Navajo settlement, on the October 27, 1941 statement of the Commissioner, and the Secretary's approval thereof on January 8, 1942. But we have indicated above that subsequent events demonstrate that no such cut-off date was in fact imposed. Navajos entering after October 24, 1936 for purposes of residence, were treated exactly the same as those who had entered prior thereto. All were dealt with as if they had rights of use and occupancy, and the only possible source of those rights was implied Secre-

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[65]The "Department" position to which Cohen made reference, was the Commissioner's statement of October 27, 1941, which was approved by the Secretary on January 8, 1942. See note 51 above. The Commissioner's statement, quoted earlier in this opinion, was not that Navajos "would not be allowed to settle on the reservation after October 24, 1936," but that only the Navajos residing on the reservation on October 24, 1936, "have rights on the Reservation."

[66]In this regard, Cohen stated in his opinion:

". . . I do not mean to imply that the Navajos could acquire rights in the reservation through the Secretary's inaction or through his failure to exercise the discretion vested in him by the Executive order. But the Secretary is not chargeable with neglect in this matter. Throughout the years the Secretary has sought and obtained funds from Congress which have been used for the education of the children of Hopis and Navajos alike, and the grazing and the livestock of both groups has been permitted and regulated by the Secretary. This, to my mind, is conclusive evidence that the settlement of the Navajos on the reservation has been sanctioned and confirmed by the Secretary, and that their settlement is therefore lawful, resulting in the necessity of recognition of their rights within the area."

tarial settlement. Indeed, the very 1941-1942 statement relied upon as expressing the department's "cut-off" position, was made in justification of the action of the Government in recognizing the legal status of all Navajos then (1941-1942) in the reservation. This belies, at the outset, any official intention to put the asserted "cut-off" policy into effect.

Insofar as Cohen, in the quoted statement, expressed an opinion as to the legal significance to be attached to the course of official conduct through the years, the statement is not competent evidence on the question of Navajo settlement. But to the extent that the statement reports what administrative action was taken while he was acting solicitor, the statement is authoritative and substantial evidence of those facts.[87] The facts so reported were that the Secretary had sought and obtained funds from Congress which were used for the education of the children of Hopis and Navajos alike, and that the grazing of the livestock of both groups had been permitted and regulated by the Secretary.

In the late 1940's there was a considerable increase in the amount of joint administrative activity in the 1882 and the Navajo reservations. On May 4, 1948, for example, an agreement of cooperation was drawn up between the Navajo and Hopi agencies for the initiation of soil and water conservation practices. Under this plan the Navajo and 1882 reservations, considered as a unit, were divided into five work areas. District 6 and several other districts which included 1882 reservation lands, were combined to constitute "work area" No. 4, with headquarters at Keams Canyon. All soil conservation activities were to be under the general supervision of the conservationist in charge, at Window Rock, Arizona.

Another example of such intermingling of Navajo and Hopi administrative action is to be found in Secretary of the Interior J. A. Krug's proposal, advanced in his report entitled "The Navajo," issued in March, 1948. It was his proposal that Navajo and Hopi families be resettled on irrigated land of the Colorado River Indian Reservation in Western Arizona. By the spring of 1949, this program was under way.

A third example of such joint agency action is evidenced by a letter dated December 14, 1949, sent by road engineer H. E.

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[87] Cohen served as acting solicitor for periods of varying length, beginning on June 4, 1942.

Johnson, employed by the Navajo Service at Window Rock, to Walter O. Olson, assistant Superintendent of the Hopi Agency. Johnson recommended that the Hopi road department use the Navajo road department in an advisory capacity along the pattern of the old regional office. "All construction, maintenance, and engineering should be inspected and approved by this office," Johnson wrote.

By July, 1951, the total population of the Navajo Indian Tribe was 69,167, about six thousand of whom lived within the 1882 reservation. By the summer of 1958, the Navajo population in the 1882 reservation was probably about 8,800, not including a few Navajos living within district 6, as expanded in 1943. The places of residence of the Navajos within the 1882 reservation were scattered quite generally over the entire area outside of district 6.

According to a comprehensive Navajo school census taken in 1955, there were 2,929 Navajo children then living in the 1882 reservation. By 1958 Government schools for Navajo children were being maintained within the 1882 reservation at Pinyon, Smoke Signal, White Cone, Sand Springs, Dinnebito Dam and Red Lake.

In 1951, the Hopi population within the 1882 reservation was about 3,200. By the summer of 1958, the Hopi population was probably something in excess of that figure. Most of these Hopis resided within district 6, as expanded in 1943.[68] A few had homes, farms or grazing lands in adjoining districts in the 1882 reservation.

Other Hopi activities then being carried on outside district 6, as expanded, included wood cutting and gathering, obtaining coal, gathering plants and plant products for medicinal, ceremonial, handicrafts and other purposes, visiting of ceremonial shrines, and a limited amount of hunting.

We believe that it is indicated by the events and circumstances reviewed above that, during the last half of the 1940's, and up to enactment of the Act of July 22, 1958, all Navajos who entered the 1882 reservation for purposes of residence, were treated no

[68]Not included in this figure are the several hundred Hopis living a few miles west of the 1882 reservation at Moencopi. The forebears of these Hopis had left "Old Oraibi" in the reservation area, and moved to Moencopi in a 1906 "revolt."

differently than those who had entered betwen 1936 and 1945, or those who had entered before October 24, 1936. All were dealt with administratively as Indians having rights of use and occupancy in that reservation, such rights being equally protected and the welfare of all such Indians being equally served by continuous and consistent Government action through the years.

No attempt was made to separately identify the Navajos who entered prior to October 24, 1936, and their descendants, much less were they accorded any privileges or assistance which was withheld from subsequent Navajo immigrants into the reservation.

In our opinion, the course of administrative action and accompanying pronouncements, from February 7, 1931 to July 22, 1958, with exceptions which we discount for reasons stated, warrant the finding, which we make, that all Navajos residing in the 1882 reservation in July, 1958 were impliedly settled therein by the Secretary of the Interior in the exercise of his authority to settle other Indians in that reservation.

The question remains whether, in settling Navajos in the reservation, the Navajo Indian Tribe itself was impliedly settled in the 1882 reservation.

Throughout the period from February 7, 1931, when Navajo rights of use and occupancy were first administratively recognized, to July 22, 1958, Navajos entered the 1882 reservation for purposes of residence without limitation as to number. Nor was any effort made to pick and choose between Navajos who might enter, all who came being administratively welcome. This course of administrative conduct is explainable only on the hypothesis that the Navajo Indian Tribe itself had been settled in the 1882 reservation.

There are other considerations which lead to the same conclusion.

Beginning at least by 1937, the Navajo Indian Tribe was administratively recognized as having duties and responsibilities as the representative of Navajos living in the 1882 reservation. The authority for the grazing regulations approved June 2, 1937, under which establishment of land management districts was authorized, rested in part on a resolution of the Navajo Tribal Council dated November 24, 1935.

Navajo residents everywhere in the reservation have always participated in the election of Navajo delegates to the Navajo

Tribal Council. Prior to 1953, these elections were supervised and conducted by the Bureau of Indian Affairs. Navajo tribal rangers were given authority to issue permits for the cutting and gathering of wood.

On January 1, 1955, the Commissioner approved resolutions of the Navajo Tribal Council, adopted in 1954, relating to traders' leases, under which the Navajo Indian Tribe granted leases to traders in the 1882 reservation.

Plaintiff, however, argues that settlement of the Navajo Indian Tribe after May 25, 1918, was precluded by the enactment of that date. That statute, 25 U.S.C. § 211, provides that no Indian reservation shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of New Mexico and Arizona, except by Act of Congress. Plaintiff calls attention to the fact that defendant, for the Navajo Indian Tribe, has disclaimed any joint interest in the reservation with the Hopis. Plaintiff argues from this that the necessary effect of the exclusive Navajo tribal settlement which defendant asserts would be to add lands to Navajo Indian Reservation in Arizona, a result expressly prohibited by the 1918 Act.

At this point in the opinion we are considering only the question of Navajo settlement, and are not concerned with the character of any such settlement, as exclusive or joint. At a later point we will discuss the significance of the 1918 Act with regard to the character of any Navajo settlement which may be found to have occurred. In our view, the 1918 Act did not operate to terminate the authority of the Secretary, premised on the Executive Order of December 16, 1882, to settle other Indians, including Indian tribes, in the reservation area.

We conclude that the Navajo Indian Tribe has been settled in the 1882 reservation. See *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307; *The Cherokee Trust Funds*, 117 U.S. 288, 308.

Specific Rights Held by Hopis and Navajos on July 22, 1958

Earlier in this opinion, following footnote reference 11, it was stated that immediately upon the issuance of the Executive Order of December 16, 1882, the Hopis gained non-vested rights of use and occupancy in the entire 1882 reservation. These rights were then exclusive in the sense that unless and until the Secre-

tary thereafter settled other Indians in the reservation, the Hopis were the only Indians entitled to use and occupy that area. These rights were non-exclusive in the sense that the Hopis would be required to share the 1882 reservation with any other Indians the Secretary thereafter saw fit to settle in the reservation. Such rights as the Hopis had in the reservation on July 22, 1958, became vested on that date.

We have also found and concluded that, beginning on February 7, 1931, the Secretary saw fit to settle in the reservation, as they arrived (with indicated lapses), Navajos who entered the 1882 reservation prior to July 22, 1958 for the purpose of establishing permanent residence. We have further held that by at least June 2, 1937, but not prior to February 7, 1931, the Navajo Indian Tribe itself was impliedly settled in the 1882 reservation. Rights of use and occupancy thereby acquired were not vested prior to July 22, 1958, but became vested on that date.

It is now necessary to determine what specific rights of use and occupancy the Navajo Indian Tribe and individual Navajos held in July 22, 1958, by reason of such Secretarial settlement, and what specific rights of use and occupancy the Hopi Indian Tribe and individual Hopis held on that date in view of the settlement of Navajos and other circumstances.

In making this determination we must first decide whether the Navajo Indian Tribe and individual Navajos were authorized to settle in the entire 1882 reservation and, if not, what part was made available to them by such authorization.

It has previously been stated that some three hundred Navajos not identified on this record, were settled in the 1882 reservation in 1909-1911, during the second allotment period involving that reservation. It has also been indicated that there is some evidence, although perhaps not sufficient to warrant a finding, that Navajos residing in the reservation on February 29, 1924, were impliedly settled therein, in view of Commissioner Burke's statement of that date and the circumstances under which it was made. But substantial and, to us, adequate proof of implied settlement of Navajos, other than the three hundred settled in 1909-1911, came first on February 7, 1931. It was on that date that Secretary Wilbur and Commissioner Rhoads joined in a letter approving the Hagerman-Faris proposal that the reservation be divided between Hopis and Navajos.

It is therefore established that implied Secretarial settlement of Navajos and the policy of segregating Navajos from Hopis were initiated at the same time. In fact, it was the initiation of that policy which, under the indicated circumstances, warrants the inference that the Secretary settled Navajos in the reservation on February 7, 1931.

This segregation policy remained constant from the time it was initiated until the time Indian rights in the reservation became vested on July 22, 1958. This is evidenced by the efforts which were made through the years to effectuate that policy.

It was first sought to accomplish this by means of a provision to be incorporated in the proposed Navajo Indian Reservation Act. That plan failed of realization when, because of Hopi opposition, the Department of the Interior withdrew its proposal to incorporate such a provision in the bill.

The Office of Indian Affairs then sought to accomplish the same result by means of land-use regulations under which land management districts were created, one of which (No. 6) was designed to include most of the Hopis in the 1882 reservation.

When this plan was first put into operation in 1936, there was no intimation that Hopis were to be limited to the district 6 area. Nor was such a policy publicly proclaimed when comprehensive grazing regulations were approved on June 2, 1937, under which the administration of the land management districts was provided for in great detail. But shortly after the latter regulations became effective, the practice was initiated of forbidding Hopis to move outside district 6, or even to graze outside that district, without first securing permits. These permits were usually issued only on a showing of past Hopi use.

It was then sought to formalize this segregation practice by means of a Secretarial order. This attempt was abandoned when the solicitor ruled, on February 12, 1941, that such an order would be invalid unless consented to by the Hopis. But then the Office of Indian Affairs continued to accomplish the same result through its previous land-use regulations and associated practices, as modified from time to time, none of which was ever approved by the Hopis. It was on this basis that the segregation practice was continued without interruption until all rights became vested on July 22, 1958.

Secretarial settlement of the Navajo Indian Tribe and individual Navajos, between 1931 and 1958, has been implied from

the general course of administrative action and policy during that period. Thus, to the extent that administrative policy in effect during that period would not warrant such an implication, Secretarial settlement of Navajos did not occur. It follows that, since it was the continuing policy to segregate Navajos from Hopis during all of these years, the implied settlement of Navajos in the 1882 reservation was at all times subject to the restriction that they were not to use and occupy that part of the reservation in which the Hopi population was concentrated.

It therefore becomes necessary to delineate, consistent with the finding and conclusion just stated, the specific geographical area in which the Navajos were authorized to settle.

This geographical area was not fixed with precision when the first general manifestation of implied settlement of Navajos occurred in 1931.[69] On November 20, 1930, when Hagerman and Faris submitted a report recommending a division of the 1882 reservation, they provided a general description of the area which, in their view, should be set aside for the use of Hopis. This description, however, was not sufficiently precise for practical application, as they themselves recognized. It was their suggestion that if their recommendation was accepted in principle, a detailed reconnaissance of the lines as approximately proposed be made with a view of developing a detailed boundary description.

It follows that, in approving the Hagerman-Faris recommendation, on February 7, 1931, the Secretary and Commissioner did not fix a precise geographical area of authorized Navajo settlement. They did direct that field studies be undertaken for the purpose of formulating a specific boundary description.

These studies were made, and the boundary lines thus arrived at for the proposed exclusive Hopi area were set out in Hagerman's second report, dated January 1, 1932. In this report Hagerman expressed the view that the proposed boundaries for this area of exclusive Hopi occupancy were fair and just to both Hopis and Navajos. He added, however, that "(t)his does

[69] A part of the 1882 reservation excluded from Navajo settlement is not in dispute. Defendant has, in effect, conceded that no Navajos have ever been settled in a south-central area consisting of about 488,000 acres, as described in paragraph 12 of the findings of fact and depicted in the map which is a part of this opinion. See pretrial order No. 2, page 2.

not mean that they might not be changed in the future if conditions warrant."

The boundaries as proposed by Hagerman in his 1932 report were incorporated in the first draft of the Navajo Indian Reservation Act, tendered to Congress by the Department of the Interior on February 8, 1932. But, as stated earlier in this opinion, that feature of the bill was later withdrawn. Subsequent events establish that the exact boundaries of the proposed area of exclusive Hopi occupancy were still only tentative.

While the Navajo Indian Reservation bill was pending before Congress in early 1934, further studies were being carried on in the field concerning the exact boundaries of an exclusive Hopi area. A report thereon was submitted by range examiner Joseph E. Howell, Jr., on April 16, 1934. He proposed that the area for the Hopis be extended by adding 59,225 acres thereto stating, however, that this would still not include all Hopi fields.

In early 1936, the district land management plan was developed for the purpose of implementing the land-use regulations which had been issued on November 6, 1935. In order to simplify land-use administration it was determined to place in one district (No. 6) the part of the 1882 reservation in which most of the Hopis were concentrated. The record before us contains no metes and bounds description of the 1936 lines, but they are depicted on maps which are in evidence as plaintiff's exhibit 306 and defendant's exhibits 444 I and 537(f). The 1936 lines as so depicted are shown on the map which is a part of this opinion.

The 1936 lines of district 6, however, were only tentative. We say this not only because Howell's proposed modifications of those boundaries were then under consideration by the Office of Indian Affairs, but also in the light of immediately succeeding events.

In the summer of 1937, the Hopis began to complain that Navajos were encroaching upon long-held Hopi grazing and agricultural lands outside district 6. At an August, 1937 conference held to consider these complaints Navajo Superintendent Fryer made it clear that the 1936 district 6 boundaries did not include all established areas of Hopi occupancy. He stated that while it was attempted to include all Hopi range use within district 6, this proved impossible in several instances and there were still Hopis living, grazing and farming outside that district.

It was in 1937 that the effort got under way to obtain a Secretarial order which would, among other things, formalize the practice then being followed of forbidding Hopis from grazing or moving outside of district 6. In connection with this project, new studies were undertaken with respect to the boundary lines of that district. These studies eventually led to the Rachford boundary report of March 1, 1940, referred to earlier in this opinion, in which it was recommended that 21,479 acres be added to district 6.

The Rachford boundary proposals, as somewhat modified, were incorporated in the draft of the Secretarial order which was later disapproved by the solicitor on February 12, 1941. For some time thereafter the Office of Indian Affairs sought to formulate a revised form of order which would be acceptable. In this connection the boundaries of district 6 were further reviewed. This led to the preparation of a revised description which would have increased district 6 acreage by 8,096 over the Rachford proposal. Finally, all efforts to secure an order formalizing the segregation practice were abandoned. But the segregation practice itself was continued.

On April 18, 1942, Commissioner Collier instructed Centerwall to study the boundary problem. Centerwall submitted his report on July 29, 1942, recommending enlargement of district 6 to 641,797 acres, as compared to the original acreage of 499,248. The boundaries suggested by Centerwall to accomplish this enlargement were thereafter somewhat reduced by agreement between the Hopi and Navajo superintendents, resulting in a proposed district 6 acreage of 631,194.

On April 24, 1943, the Office of Indian Affairs approved the district 6 boundary lines proposed by Centerwall, as so modified.[70] It was therefore on that date that the lines within the 1882 reservation, utilized under administrative policy to segregate Hopis from Navajos, were first definitely fixed.

Accordingly, in our view, it is those lines which must be regarded as defining the part of the 1882 reservation in which Navajos were authorized to settle. Specifically, the Navajo Indian Tribe and all individual Navajos residing in the area on July 22,

[70]The metes and bounds description of district 6, as so defined, is set out in paragraph 41 of the findings of fact and is depicted in the map which is a part of this opinion.

1958, were authorized to settle in all parts of the reservation outside of district 6 as defined on April 24, 1943, and neither the Navajo Indian Tribe nor individual Navajos were authorized to settle within that district as so defined.

Since no Navajos were authorized to settle within district 6, as thus defined, we find and conclude that, on July 22, 1958, the Hopi Indian Tribe, for the common use and benefit of the Hopi Indians, had the exclusive interest in such area, subject to the trust title of the United States. Therefore, pursuant to section 2 of the Act of July 22, 1958, this area is henceforth a reservation for the Hopi Indian Tribe. A declaration to this effect is included in the judgment entered herein.

This leaves for determination the relative rights of the Hopis and Navajos in that part of the 1882 reservation lying outside of district 6 as defined on April 24, 1943.

By our holding that the Navajo Indian Tribe, and all individual Navajos residing in the reservation on July 22, 1958 were settled therein by Secretarial action, we have rejected the Hopi contention that Hopis have the exclusive interest in that part of the reservation now under discussion.

It is the further contention of the Hopis, however, that if the court finds and concludes that the Navajos have acquired by Secretarial settlement, rights and interests in any part of the reservation, such rights and interests are not exclusive as to any part of the reservation area, but are co-extensive with those of the Hopi Indians, subject to the trust title of the United States.

The Navajos, on the other hand, contend that as to the reservation area in which it is found and concluded that Navajos have been settled,[71] the Navajo Indian Tribe, for and on behalf of all Navajo Indians, has the exclusive right and interest therein, subject to the trust title of the United States.

The Navajos advance a number of arguments in support of the contention that the Navajo Indian Tribe, on July 22, 1958, had the exclusive interest in that part of the 1882 reservation in which it has been found to have been settled. One of these

[71] The Navajos contend that this area is larger than that part of the reservation lying outside of district 6, as defined on April 24, 1943, but we have found and concluded that no Navajos were settled by Secretarial action within district 6 as so defined.

is that, on July 22, 1958, the Navajos had actual exclusive use and occupancy of this area and, as used in the act of that date, "exclusive interest" means exclusive use and occupancy.

On July 22, 1958, a few Hopis were residing in that part of the reservation now under discussion. In addition, Hopis have continuously made some use of a large part of that area for the purpose of cutting and gathering wood, obtaining coal, gathering plants and plant products, visiting ceremonial shrines, and hunting.

For present purposes, however, we will assume that actual Navajo use and occupancy of the area was exclusive or was so nearly so as to render Hopi use and occupancy *de minimis*.

Defendant's equating of "exclusive interest" with actual exclusive use and occupancy finds no support in the Act of July 22, 1958. Section 2 of that Act, which provides the authority for a judicial determination of the issue, speaks of "exclusive interest" and not "exclusive use and occupancy." Had Congress intended to make actual exclusive use and occupancy the sole test, it would have been easy for it to have so stated in the legislation.

Actual use and occupancy of land, without more, has no connotation of rightful possession. A trespasser may have actual use and occupancy of land. Indians may obtain actual use and occupancy of reservation lands belonging to other Indians by just moving in without any semblance or color of right. Or they may obtain such use and occupancy through invalid administrative action.

Similarly, even though use and occupancy is rightful, the fact that it is actually exclusive does not connote that the exclusive nature of the use and occupancy is rightful. Persons having the right to share lands with others may, by force or other illegal means, shoulder out the others and gain actual exclusive use.

But Congress was not interested in recognizing claims based on force or other illegal action. In section 1 of the Act of July 22, 1958, the 1882 reservation was declared to be held in trust for Indians who had established rightful claims thereto, either by virtue of the Executive Order of December 16, 1882, or by virtue of Secretarial settlement subsequent to that date. An indicated purpose of the litigation thereby authorized, as set out in section 1, was to determine the "rights and interests" of the par-

ties, not the fact of actual use and occupancy of the lands in question.

Another indicated purpose of the litigation, as set out in section 1, was to quiet title to the lands in the tribes or Indians establishing "such claims pursuant to such Executive order as may be just and fair in law and equity." Here, again, the authority was referenced to claims cognizable in law and equity. Section 2, as noted above, makes use of the term "exclusive interest," instead of "exclusive use and occupancy."

Defendant calls attention to a Committee Report comprising a part of the legislative history of the Act of July 22, 1958,[72] in which the Committee used these words: ". . . Because of the nature of the conflicting claims of use and occupancy interests. . . ."

We do not share defendant's view as to the significance of the quoted words. It is true that the claims in question relate to use and occupancy. But, as even this excerpt indicates, the claims must be of a kind which properly may be characterized as interests in land. An interest in land may be subject to paramount rightful claims, as in this case, where the claim of the United States was paramount prior to July 22, 1958. But, except for paramount rightful claims, an interest in land is one which is enforceable in court because it is grounded on recognized principles of law.

The principle of law which must be applied with reference to the Navajo claim to an exclusive interest in part of the reservation is that prior rights continue until lawfully terminated. On December 16, 1882, as we have concluded, the Hopis obtained non-exclusive rights of use and occupancy in the entire reservation. We have concluded that the Navajos obtained no rights in the reservation at that time and that, with immaterial exceptions, their only rights acquired by Secretarial settlement first came into existence in 1931.

Hence the Navajo rights are not exclusive as to any part of the reservation unless the pre-existing Hopi rights therein were lawfully terminated. As we see it, the Hopi rights could be lawfully terminated only by Congressional enactment, valid administrative action, or abandonment. Each of these possibilities will be explored later in this opinion.

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[72] H.R. Report No. 1942, 85th Cong. 2nd Sess., on S. 692.

Defendant contends that the Enabling Act of July 22, 1958, does not establish one criterion for the Hopis and another for the Navajos. Accordingly, it is argued, if proof of actual exclusive use and occupancy is enough to establish that the Hopis have an exclusive interest in part of the reservation, it is enough to establish that the Navajos have the exclusive interest in the remainder.

We have not held that proof of exclusive Hopi use and occupancy of district 6 is enough to establish an exclusive Hopi interest in the district 6 area. In addition to exclusive Hopi use and occupancy it was also established that they gained rights of use and occupancy therein (and in the entire reservation) by the self-operating effect of the December 16, 1882 order. It was also established that the Secretary had not settled any Navajos in the district 6 area.

A different criterion must be applied in evaluating the Navajo claim to an exclusive interest because their claim rests on a different foundation than that which supports the Hopi claim. The Hopi claim to an exclusive interest in the district 6 area rests on rights gained in 1882, undiminished by subsequent Secretarial settlement of other Indians. The Navajo claim to an exclusive interest in part of the reservation must rest on rights gained in 1931 and thereafter plus lawful termination of pre-existing Hopi rights.

We now proceed to consider whether, as to that part of the 1882 reservation lying outside of district 6, the Hopi rights of use and occupancy, acquired on December 16, 1882, were ever lawfully terminated. As before indicated, this could only have been brought about by Congressional enactment, valid administrative action, or abandonment.

Turning first to Congressional enactments, it appears that on several occasions the question was raised as to whether the Hopi interest in part of the 1882 reservation should be legislatively terminated.

The first such occasion was in 1920, when the House Committee on Indian Affairs held hearings at Keams Canyon and Polacca, in the reservation, to investigate the conflicting claims of the Hopis and Navajos. The then Congressman Hayden inquired at this hearing as to whether it was advisable to "lay out a separate reservation for the Hopi Indians, which will be theirs and free

from further encroachment from the Navajos?" Robert L. Daniel, the Hopi School Superintendent at Keams Canyon, indicated that this would be desirable. No legislation of this character, however, resulted from this committee hearing.

The Senate Committee on Indian Affairs held hearings at Keams Canyon, Toreva, Hotevilla, Oraibi (within the reservation), and Tuba City, Arizona, in April and May of 1931. Hopi Superintendent Miller and Navajo witnesses urged that a division of the 1882 reservation be effectuated. But Congress took no action at that time.

While the Navajo Indian Reservation Act of June 14, 1934, 48 Stat. 960, was before Congress, the Department sought to include language which would have terminated Hopi rights in a large part of the reservation. As stated earlier in this opinion, this language was finally withdrawn, and instead, there was inserted in section 1 of that Act the words: ". . . however, nothing herein contained shall affect the existing status of the Moqui [Hopi] Indian Reservation created by Executive order of December 16, 1882. . . ."

While the bill (S. 2734; H.R. 3178, 81st Cong.) which was to become the Navajo-Hopi Rehabilitation Act of April 19, 1950, 64 Stat. 44, was before the House Subcommittee on Indian Affairs, the matter of dividing the 1882 reservation was discussed. Congressman Morris asked Theodore H. Haas, Chief Counsel of the Bureau of Indian Affairs, if Congress should attempt any settlement of the issue in that bill. Haas replied: "I should recommend most decidedly against bringing in this difficult, extraneous issue which would cause the resentment and opposition of the Navahos and Hopis."

The committee also had before it a letter from the Commissioner of Indian Affairs recommending against inclusion in the pending bill of any provision dealing with the 1882 reservation boundary problem. No such provision was included in that bill.

During the years subsequent to 1931 there were numerous appropriation bills in which funds were appropriated for the construction and maintenance of schools for Navajo children. As previously stated, a number of these schools were built within the 1882 reservation, beginning with the school at Pinon, erected in 1935. Federal funds, appropriated by Congress, were also utilized

for the supervision of Navajo affairs and activities, and the rendition of aid to Navajos, within the reservation area.

The appropriation acts themselves, however, do not specifically mention a segregation of administration of Navajo and Hopi affairs in the 1882 reservation. Nor do any of them contain any declaration or other provision indicating an intent to terminate Hopi rights.

It therefore appears that the only occasion during this entire period on which the Congress legislatively dealt specifically with the problem (the Navajo Indian Reservation Act of June 14, 1934), it inserted a provision expressly disclaiming any intent to terminate Hopi rights and interests. As late as 1950, while the Navajo-Hopi Rehabilitation Act was under consideration, the boundary matter was considered an open question not previously resolved by Congress.

We conclude that Congress at no time enacted legislation designed to, or having the effect of, terminating Hopi rights of use and occupancy anywhere in the 1882 reservation.

We next consider whether the Hopi rights of use and occupancy, established on December 16, 1882, were at any time terminated by valid administrative action.

Since, with indicated immaterial exceptions, no Navajos or other non-Hopi Indians were settled in the reservation prior to February 7, 1931, there was no occasion prior to that date for administrative action designed to terminate Hopi rights in any part of the reservation. It is therefore not surprising that the record is barren of any evidence that administrative action of this kind was taken prior to 1931.[73]

Beginning on February 7, 1931, administrative officials followed a policy designed to exclude Hopis, for the most part, from those parts of the 1882 reservation not immediately adjacent to their villages. At the outset it was sought to accomplish this by legislation in the form of a provision in the bill which was to become the Navajo Indian Reservation Act of 1934, describing the area of concentrated Hopi population as an exclusive Hopi reservation. Had this been accomplished, the Hopis would un-

[73]For the reasons indicated later in this opinion administrative action of this character would not have been legally possible, without Congressional approval, after March 3, 1927, in view of section 4 (25 U.S.C. § 398d) of the act of that date, 44 Stat. 1347.

questionably have been legally ousted from the remainder of the 1882 reservation.

But this way of effectuating the indicated administrative policy failed of realization when the Department of the Interior found it necessary to revise the language of the proposed Navajo Indian Reservation Act. Thereafter, administrative efforts to exclude Hopis from parts of the reservation not immediately adjacent to their villages, took the form of administrative regulations and practices pertaining to land use. None of these administrative regulations and practices, however, with the possible exception of the abortive effort to obtain a Secretarial order in 1941 defining areas of exclusive occupancy, were designed to affect whatever rights the Hopis then had in the entire 1882 reservation.

This is established beyond question by the representations repeatedly and consistently made by departmental officials throughout this entire period, beginning on February 17, 1937. On that date Allan G. Harper submitted a plan of administrative interrelationships between the Hopi and Navajo jurisdictions. This plan, which was approved by the Commissioner on March 16, 1937, contains this statement:

> ". . . This arrangement will be tentative until the definite boundary of the Hopi-Navajo reservation shall have been determined. This arrangement is established as a matter of administrative expediency and convenience and shall not be construed in any way as fixing an official boundary between the two tribes, or as prejudging in any way the boundary which is ultimately established."

On December 28, 1937, the Commissioner signed and promulgated a map defining land-management districts. In advising Navajo Superintendent Fryer of this action, the Commissioner stated:

> "It is understood, also, and it should be clearly explained to the Navajo and the Hopi counsels [sic], that a delineation of District 6 is not a delineation of a boundary for the Hopi Tribe, but is exclusively a delineation of a land-management unit."

On July 13, 1938, Commissioner Collier and six of his staff officials met with Hopi leaders at Oraibi, Arizona. The practice had by then already been established whereby Hopis could not

go outside of district 6, as then tentatively established, without first obtaining a Government permit. Commissioner Collier explained to the Hopis on this occasion that the permit system was a part of the grazing regulation procedure, adding: "That has nothing to do with the reservation boundary." At another point during this conference the Commissioner stated that nothing with regard to the plan for the administration of district 6, as outlined by him on that occasion, ". . . predetermines or settles anything with regard to the ultimate Hopi Tribal boundary. . ."

On April 24 and 25, 1939, four Hopi leaders met with the Commissioner and other agency officials in Washington, for the purpose of presenting their land claims. Discussing the question of the division of the reservation into "use" areas, the Commissioner assured the Hopis that: "any agreement which is made of use-rights will not be a giving up of this claim." Continuing, the Commissioner stated:

> "The creation of district 6 was not a finding as to what area the Hopis should occupy. The Hopis were not consulted. The making of the true finding is in the future."

On September 4, 1941, the Office of Indian Affairs ruled that proposed changes in the boundaries of district 6 should be submitted to the Hopi Tribal Council for consideration and approval. At this time Assistant Commissioner William Zimmerman, Jr., informed Navajo Superintendent Fryer that the proposed adjustment in the boundary could not "be considered as a permanent adjustment of the reservation boundary but must be considered merely as a change in the land management district."[74]

In a memorandum to the Forestry and Grazing Division, J. M. Stewart, Director of Lands, Office of Indian Affairs, dated October 9, 1941, it was stated:

> ". . . the establishment of such land use areas must not be confused with the establishment of reservation boundaries, as such reservation boundaries can be established only by Act of Congress. . . ."

In a letter dated October 12, 1941, signed by the Commissioner and approved by the Assistant Secretary, Seth Wilson, Superintendent of the Hopi Agency, was told that ". . . the proposed

[74] As noted earlier in this opinion, the Hopi Tribal Council did not approve this change.

change in the boundary of District 6 has no bearing on the establishment of the reservation boundary. . ."

In his report of July 29, 1942, Willard R. Centerwall, who had been commissioned to conduct a new study of the Hopi-Navajo boundary problem, submitted new boundary descriptions which, with modifications, were approved on April 24, 1943, as the revised lines of district 6. In this report Centerwall stated that it must be clearly understood that the setting aside of a land management unit for the Hopi Indians:

> ". . . does not create a reservation boundary, since the Hopis would remain entitled to all beneficial use, including the right to any proceeds within the remainder of the 1882 Executive Order Reservation."[75]

On February 14, 1945, Assistant Commissioner Walter V. Woehlke informed Hopi Superintendent Burton A. Ladd that construction of fences along the revised district 6 line was designed to protect the interest of Hopi stockmen and to prevent additional encroachments of Navajo livestock on Hopi ranges. "In our judgment," Woehlke wrote, "the proposed fences will have no effect on Hopi land claims, but will prove to be a great practical value to the Hopi stockmen."

William A. Brophy, who succeeded Collier as Commissioner of Indian Affairs, gave Hopi leaders the same assurance on April 26, 1945. He stated:

> "I want to assure that any fences built will in no wise be construed as establishing district 6 as the Hopi Reservation, or jeopardize any claims which you may have to other lands. The purpose of the fence is not to mark off the boundaries of the reservation, but merely to prevent cattle and horses from straying; to assist the stockmen in improving the quality of their herds, and in controlling the breeding program by preventing inferior sires from mixing with the herds."

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[75]In arriving at adjustments in the Centerwall district 6 lines, the Navajo and Hopi superintendents agreed on certain principles to be applied, one of which was that the principal purpose of the establishment of the adjusted district 6 line was the erection of a barrier which would prevent the crowding in of new families of Navajos onto territory used by the Hopis.

Again, on May 3, 1945, the Commissioner gave the same assurance to Senator Burton K. Wheeler. Commenting upon a complaint the Senator had received from the Hopis concerning the fencing of district 6, the Commissioner stated:

> ". . . In the 1880s by Executive Order an area of about 3,000,000 acres, with the Hopi villages in the center, was set aside as a reservation for the Hopis and such other Indians as the Secretary might designate. At the time of the establishment of the Hopi Reservation several thousand Navajos were already using a large part of the area. The Navajo population grew faster than the Hopi population with the resulting gradual encroachment of Navajos upon the areas used by the Hopis, especially by Hopi livestock. In order to protect the Hopis against additional encroachment by Navajo livestock upon the Hopi range, certain limits were established beyond which Navajo livestock would not be allowed to graze. This was in no sense an establishment of boundary lines of the Hopi Reservation. Those boundary lines still are the lines of the Executive Order reservation."[76]

At a later point in the same letter, Senator Wheeler was told:

> ". . . They [Hopis] have been assured several times that these fences do not establish any boundary line for the Hopi Reservation and that no new delimitation of the reservation boundaries is intended."

On May 12, 1948, Acting Commissioner William Zimmerman, Jr., wrote to an interested citizen:

> ". . . I wish to assure you that the establishment of District 6 does not modify in any way Hopi rights in the Executive Order Reservation of 1882. . . ."

In view of these repeated administrative assurances as to the limited purpose in establishing and fencing district 6, and the

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[76]Defendant argues that, in view of the context, the Commissioner was here referring to an "undefined inner boundary between the Hopis and the Navajos within the Executive Order area," rather than the boundary lines of the 1882 reservation. We do not agree.

It is also to be noted that the Commissioner's statement in this letter that "several thousand Navajoes were already using a large part of the area" in 1882, was in error, since there were then not more than three hundred Navajos in the 1882 reservation area.

express disavowal during all of these years of any intent to affect Hopi rights and interests in the entire 1882 reservation, the contention that the Department sought termination of Hopi rights outside of district 6 is without factual foundation.

But even if this had been the purpose of the Department, the question remains whether this could have been legally accomplished without a Congressional enactment.

Secretarial settlement of the Navajo Indian Tribe, and of individual Navajo Indians, with exceptions which must be disregarded for reasons already stated, did not occur prior to February 7, 1931. By that time there were in effect two statutes bearing upon the power of administrative agencies to create new reservations, and to make additions to or change the boundaries of, existing reservations.

The first of these is the Act of May 25, 1918, section 2 of which (25 U.S.C., § 211), provides that no Indian reservation shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of New Mexico and Arizona, except by Act of Congress.

In his opinion of February 12, 1941, the solicitor of the Department of the Interior ruled that the proposed Secretarial order then under consideration, whereby the 1882 reservation would be divided into areas of exclusive Hopi and Navajo occupancy, would be contrary to the prohibitions set out in the 1918 Act.

We are in full agreement with this view. Moreover, we think the conclusion must be the same whether the claimed administrative division of the 1882 reservation rests on a formal departmental order (which was sought but disapproved in 1941, and never again sought), or on a course of official conduct from which such a division is sought to be implied.[77]

An Indian reservation consists of land validly set apart for the use of Indians, under the superintendence of the Government, which retains title to the lands. *United States v. McGowan*, 302 U.S. 535, 539. Where there is no statutory prohibition such as

[77] We have indicated above our reasons for believing that there was no course of official conduct from which an intention to bring about such a result could be implied, and that, in fact, such a result would be contrary to the repeated and express representations of authorized officials.

that here under consideration, the setting aside of a reservation may be effectuated by the Secretary of the Interior, since the acts of the heads of departments are the acts of the executive. *United States v. Walker River Irrigation District*, 9 Cir., 104 F.2d 334, 338.

At the time the Navajo Indian Tribe and individual Navajo Indians were settled in that part of the 1882 reservation lying outside district 6, as defined in 1943, the Hopis already had rights of use and occupancy in that part. Thus, absent possible prior Hopi abandonment, to be discussed below, the initial legal status of settled Navajos must have been that of Indians entitled to share, with the Hopis, in the use and occupancy of part of the 1882 reservation. Had the Department thereafter sought to terminate all rights of the Hopis in that part, thereby giving the Navajos exclusive rights therein, the result would have been to create a new reservation for the exclusive use of Navajos.[78]

If such action would not have created a new reservation for the Navajos, it would at least have operated to add lands to their existing contiguous Arizona Navajo reservation. Either result would be contrary to the 1918 act.

Defendant argues that the authority of the Secretary to settle other Indians in the 1882 reservation was not terminated by the 1918 act. With this we agree. But the question now under discussion is whether, after that enactment, the Secretary could, in connection with his acts of settlement or otherwise, change the character of the 1882 reservation to the extent of terminating rights therein which the Hopis had held since December 16, 1882, thus establishing the area as one for the exclusive use of settled Navajos. We hold that such a result was not administratively attainable after May 25, 1918.[79]

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[78] Expressing the same view, the solicitor said:

". . . Since the effect of an order creating a reservation is to give the Indians the use and occupancy of the land, an order giving certain Indians the use and occupancy of a designated area of land is, in effect, the creation of a reservation. This conclusion is true *a fortiori* where the effect is to give a tribe of Indians an exclusive right of use and occupancy in an area which was part of a larger area in which they had the right of use and occupancy in common with other Indians settled thereon."

[79] Defendant's statement, on page 13 of his reply brief, that the 1918 act "has no application to existing reservations, either those created by Statute or by Executive Order," is in error.

Defendant also argues, in effect, that if the 1918 act had been considered by the Congress to have had the effect the solicitor attributed to it, "the Enabling Act, approved July 22, 1958, would not have submitted to this court, as it did, the burden of hearing and determining all claims, including Navajo claims of settlement which are grounded upon settlement within the Executive Order area after May 25, 1918. . ."

Under the solicitor's ruling, and under our like ruling, the 1918 act is held to foreclose administrative termination of Hopi rights in any part of the 1882 reservation, and establishment of exclusive Navajo rights in part of the reservation, after May 25, 1918. Congress did not know, when it passed the Act of July 22, 1958, what rights, if any, the Hopis would be declared to have in the reservation, the extent to which Navajo claims would be based on events after May 25, 1918; or the extent to which Navajo claims, if established on the basis of events subsequent to that date, would be held to be joint or exclusive in character. Thus the 1958 enactment represents no expression of Congressional opinion as to the meaning of the 1918 act, or the effect it might have on the outcome of this case.

The second statute which has a bearing on the question now under discussion, is section 4 of the Act of March 3, 1927, 25 U.S.C., § 398d. This statute provides that changes in the boundaries of reservations created by executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress, with the proviso that the Secretary may make temporary withdrawals.

In his opinion of February 21, 1941, the solicitor relied upon this act, as well as the 1918 act, in ruling that the Secretary was without power to divide the 1882 reservation into areas of exclusive Hopi and Navajo occupancy. In his opinion:

> "The proposed order would not only change the boundaries of the 1882 reservation but would also, in effect, create a Hopi Reservation where no reservation exclusively for the Hopis had previously existed, and would thus violate the prohibition in the 1918 act against the creation of any reservation within the limits of the State of Arizona except by act of Congress."[80]

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[80] Our ruling herein that the Hopis have the exclusive interest in that part of the 1882 reservation consisting of district 6, as defined in 1943, does not run counter to the solicitor's quoted view. Our opinion as to

Again, we are in accord with the views expressed by the solicitor. Had the department, at any time after the 1927 statute became effective, sought to terminate Hopi rights in part of the 1882 reservation, so that such part would be for the exclusive use of the Navajo Indian Tribe or individual Navajo Indians, the result would have been to change the boundaries of the 1882 reservation by dividing it in two. In addition, there would have been, in effect, a change in the boundaries of the contiguous Navajo reservation, to include that part of the 1882 reservation in which Navajos were granted exclusive rights.

For the reasons indicated we hold that the Hopi rights of use and occupancy in that part of the 1882 reservation in which Navajos were settled were at no time terminated by valid administrative action, although after February 7, 1931, the Hopis were required to share equally, use and occupancy thereof, with Navajos validly settled in that part of the reservation.

Defendant argues, however, that even if the department was without authority and even if it acted in a tortious manner, the fact that the department protected the Navajos in the exclusive use and occupancy of a large part of the reservation, conferred upon the Navajos all the normal incidents of ownership which go with Indian title. Arguing from this that the Hopis now, at best, have a claim against the Government for a taking, defendant cites *United States v. Shoshone Tribe*, 299 U.S. 476, 304 U.S. 111, 116. Our attention is specifically directed to this language in the latter opinion: ". . . for all practical purposes, the tribe owned the land."

The Shoshone Tribe of Indians of the Wind River Reservation in Wyoming sued the United States in the Court of Claims for the breach of treaty stipulations, whereby the tribe had been permanently excluded from the possession and enjoyment of an undivided half interest in the tribal lands. By the treaty of July 3, 1868, 15 Stat. 673, the Shoshone Tribe relinquished to the United States a reservation of 44,672,000 acres in Colorado, Utah, Idaho and Wyoming, and accepted in exchange a reser-

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this is not predicated on any administrative action purporting to terminate existing Navajo rights in that part of the reservation. Rather, it is based on the fact that no Navajos were settled therein, and hence never acquired any interest in that part of the reservation.

vation of 3,054,182 acres in Wyoming. The United States agreed that the territory described in the treaty would be "set apart for the absolute and undisturbed use and occupation of the Shoshone Indians. . . and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them."

In 1878, acting upon the erroneous assumption by the Commissioner of Indian Affairs that the Shoshones had consented to the settlement of a band of the Northern Arapahoes on the Wind River Reservation, that band was brought to the reservation under military escort. The Shoshones immediately made known their opposition to this arrangement, but the Indian Commissioner persisted in protecting the Arapahoes in permanent residence in that reservation.

The agent on the reservation frequently communicated to the Washington office the protests of the Shoshones, but there was nothing in return but silence. "Months lengthened into years," the Supreme Court said (299 U.S., at page 488), "and the signs accumulated steadily that the Arapahoes were there to stay." Schools were built, irrigation ditches were dug, and in numberless ways the Arapahoes were officially treated as if they had equality of right and privilege with the Shoshones.

On August 13, 1891, the Commissioner officially ruled that the Arapahoes have equal rights with the Shoshones to the land in the reservation. Both that office and Congress thereafter dealt with the reservation and the two tribes as if the Arapahoes were there permanently and rightfully. In time the Arapahoes came into exclusive possession of the eastern section of the reservation, pushing the Shoshones to the west. Finally, in 1927, an act was passed to make atonement for the wrongs of half a century by permitting the Shoshones to prosecute a claim for damages in the Court of Claims. Act of March 3, 1927, 44 Stat. 1349, Part II.

The Court of Claims gave judgment for the Shoshones in the amount of $793,821.49. Both the Government and the Shoshones appealed. The Government did not contest the merits of the claim but only the amount awarded.

It was in this context that the court, in the first *Shoshone* case, 299 U.S. 476, held in effect that, by adopting the wrongful act of a Government officer, the United States appropriated part of

the Shoshone reservation in 1878. As the Court of Claims had based the award on a supposed taking as of August, 1891, the cause was remanded for a redetermination of damages. The Court of Claims then raised the award to $4,408,444.23, and this judgment was affirmed in 304 U.S. 112.

On the second appeal the only question presented was whether the Court of Claims erred in holding that the right of the Shoshone Tribe, which had been taken, included the timber and mineral resources within the reservation. The Supreme Court held that it did, rejecting the contention that these resources belonged to the Government.

When the Supreme Court said, in this second opinion, at page 116, that " . . for all practical purposes, the tribe owned the land," it was speaking of the rights of the tribe for whom the reservation was set aside—there the Shoshones. It was not referring to rights acquired by a trespassing tribe with the tortious assistance of Government officials. Thus the *Shoshone* case does not support the view that because the Navajos, in rightful occupancy of 1882 reservation lands through Secretarial settlement, were thereafter secured in the exclusive use and occupancy of that land by the enforcement of an invalid permit system, the Navajos thereby gained an exclusive interest in the land.

Apart from this, there are obvious substantial distinctions between the *Shoshone* case and our case. The *Shoshone* case was a suit for damages by reason of the taking of lands obtained by treaty, it was not a suit against the other tribe to quiet title to reservation lands. In the *Shoshone* case the Government had no right to settle any other Indians in the reservation without the consent of the Shoshones. Here the consent of the Hopis was not required in order for the Secretary to settle Navajos in the 1882 reservation.

In the *Shoshone* case, it was the official position of the Government throughout, speaking administratively and legislatively, that the Arapahoes had the right to use and occupy the reservation. Here, the Government has never taken the position that the Navajos had the exclusive interest in any part of the reservation. Exclusive Navajo use and occupancy has at all times been justified only as a necessary grazing regulation, the intent to affect Hopi rights being officially disclaimed time after time.

We conclude that the *Shoshone* case does not support defendant's position that the Navajos have gained an exclusive interest in the 1882 reservation by Congressional or administrative action.

This leaves for determination the question of whether those Hopi rights were terminated by abandonment.

Arguing that the Hopis had no more than an interest that depended for its existence on occupancy and use, defendant contends that the Hopis lost this possessory right by failure to exercise it, prior to or after the settlement of Navajos.

In support of this argument defendant relies on that part of the opinion in *The Crow Nation v. United States*, 81 C. Cls. 238, 278, which is set out in the margin.[81]

Defendant states that this decision has been modified by subsequent Supreme Court opinions clearly establishing the rule that title to executive order reservations carries with it all the incidents of ownership. It contends, however, that Indian title to an executive order area is in the nature of tenancy by sufferance, citing *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103.

We have already stated in this opinion and in our prior opinion, that rights under an unconfirmed executive order reservation are not vested, and are in the nature of a tenancy by sufferance. But this does not answer the question of whether, under the facts of this case, the failure of the Hopis to occupy and use all of the 1882 reservation, as distinguished from Government action, operated to terminate their non-vested right to do so, accorded to them by the Executive Order of December 16, 1882.

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[81] ". . . the order of 1873 and the act of Congress of 1874 gave to the River Crows only the right to reside upon the reservation, so set apart by Executive order, and did not confer upon them any definite title or particular interest in the land. It was in the nature of a tenancy by sufferance or residential title. . . In all subsequent proclamations of the President which were ratified by acts of Congress, the River Crows were never recognized as having an interest in the area so set apart by this Executive order of 1873. It was simply a license or permission granted by the Government which could be withdrawn and ceased to exist when the River Crows returned to the Crow Nation Reservation. The Executive order reserves to the President the right to put other Indians on the reservation and this could not be done if a statutory title, as tenants in common, was given to these five tribes alone."

There is nothing in the facts or law of the *Crow Nation* decision to support the view that such non-user by the Hopis brought about a termination of such rights. In that case it appears that on July 5, 1873, the President had ordered that a tract of land, consisting of 23,000,000 acres, situated in the Territory of Dakota, be set apart as a reservation for the Gros Ventres, Piegans, Bloods, Blackfeet, River Crows, "and such other Indians as the President may, from time to time, see fit to locate thereon." This executive order was confirmed by Congress in the Act of April 15, 1874, 18 Stat. 28.

The River Crows then had their own reservation along with the Mountain Crows, and had lived therein from 1851 to 1859. In the latter year the River Crows went to the territory later described in the 1873 executive order. The purpose in creating the 1873 executive order reservation was to prevent hostilities among the tribes hunting and fishing in this territory, and to control the liquor traffic on the Missouri River.

In 1897 the River Crows finally returned to their pre-existing reservation and did not again use or occupy the 1873 executive order lands. The action of the River Crows in leaving the 1873 lands was voluntary, no force or coercion being exercised by the Government. The greater part of the 1873 lands was subsequently returned to the public domain by agreements entered into with the named tribes then living on the 1873 lands, which did not include the River Crows.

On these and other facts the River Crows made a claim against the Government for the value of their alleged interests in the 1873 lands. Rejecting this claim the court held that, under the facts, it was the clear intention of Congress and the executive departments that the River Crows were to take no interest in the 1873 reservation. Their abode thereon, the court ruled, was solely a temporary expedient in order to avoid bloodshed and to regulate the liquor traffic on the Missouri River.

The facts concerning the establishment of the instant 1882 reservation, and the use made thereof by the Hopis, are entirely different from those pertaining to the creation and use, by the River Crows, of the reservation involved in *The Crow Nation v. United States, supra.*

Here the reservation was not intended as a temporary expedient, but as a permanent reservation for the Hopis (who had no

other reservation), and such other Indians as the Secretary might see fit to settle thereon. Here, unlike the *Crow Nation* case, one of the prime purposes was to provide the Hopis with living space in addition to that which they were actually occupying in 1882, before encroaching white settlers and Navajos made this impossible. Here there was no movement by the Hopis from the part of the reservation which defendant asserts the Hopis abandoned.

The issue of abandonment is one of "intention to relinquish, surrender, and unreservedly give up all claims to title to the lands. . ." *Fort Berthold Indians v. United States*, 71 C.Cls. 308, 334. As the court stated in the *Fort Berthold Indians* case, the determination as to whether there was such an intention in a particular case depends on the facts and circumstances of that case.

It is true that the Hopis have never made much use of the part of the 1882 reservation outside of district 6 for residence or grazing purposes. But non-user alone, as the court said in the case last cited (at page 334), is not sufficient to warrant a finding of abandonment. The non-user must be of such character or be accompanied by such other circumstances as to demonstrate a clear intention to abandon the lands not used.

The failure of the Hopis, prior to the settlement of Navajos, to use a substantially larger part of the 1882 reservation than is embraced within district 6, was not the result of a free choice on their part. It was due to fear of the encircling Navajos and inability to cope with Navajo pressure.

We have outlined above the evidence pertaining to Navajo depredations against, and pressure upon the Hopis for the years prior to 1900. That this state of affairs continued for the thirty years which followed, prior to the official settlement of Navajos in the reservation, is equally well established in this record.

In his annual report of September 1, 1900, Charles E. Burton, school superintendent and acting Indian Agent at Keams Canyon, reported that the Navajos had been allowed to encroach upon "the Hopi Reservation" for years, taking possession of the best watering places, best farming and best pasture land.

On July 10, 1908, Matthew W. Murphy, special allotting agent, reported:

". . . I find practically all the springs in the possession of the Navajos, and I find Navajos living within three miles of some of the Moqui villages."

In his letter of February 14, 1911, recommending discontinuance of the second allotment project, A. L. Lawshe, Hopi Superintendent, observed that the only valid argument which could be made in favor of allotments "is that it would put a stop to the gradual encroachment of the Navajos upon the Hopi people."

On May 26, 1914, H. F. Robinson, Superintendent of Irrigation for the Land Division, stated that the Hopis desired to move out further with their livestock. But they found that the "thrifty and pushing Navajos have preempted their land and water and by gradual but continued encroachments has [sic] hemmed them in. . ." Characterizing the Hopis as peaceful and submissive, Robinson reported that they were discouraged "and feel that they are being crowded to the wall. . ."

On July 7, 1915, Leo Crane, Superintendent at Keams Canyon, reported to Washington that the problem was becoming "acute, as respects the depredations of Navajo Indians upon Hopi herds, and general differences arising because of overlapping grazing areas."

On April 6, 1916, the then Congressman Carl Hayden wrote to the then Commissioner Cato Sells stating it to be his understanding "that the Navajoes are crowding in upon these inoffensive people [Hopis] and are depriving them of the use of considerable areas that are necessary for grazing their flocks."

Inspector H. S. Traylor was assigned to make an investigation and report concerning Congressman Hayden's charges. In his report, filed June 6, 1916, Traylor stated that the Congressman's accusations concerning the Navajo's encroachment upon territory rightfully belonging to the Hopis were true. Calling attention to the arid nature of the area and the fact that springs and wells were sparse, Traylor said that: "To secure this water to supply his flocks and herds the bold Navajo has occupied the greater part of these washes and forced the Hopi back to the mesas upon which he has his villages."

In a report submitted on March 12, 1918, Leo Crane expressed the view that the Hopis had been disciplined and advanced and had prospered because they could be reached. The Navajos, on

the other hand, "may encroach, rob, kill cattle, etc., and then has 3,200 square miles of most inhospitable country in which to hide away." Crane added that the Navajos "have never respected anything save one thing—the uniform of the United States Cavalry."

On August 23, 1918, Crane again reported at length concerning Navajo depredations and the need of effective enforcement. On November 10, 1918, H. F. Robinson sent a similar report to the Commissioner, stating that the "encroachments of the Navajo Indians on the lands occupied by the Hopi Indians on the Moqui Reservation in Arizona is [sic] becoming more acute. . . ."

On October 15, 1921, General Hugh L. Scott, a member of the Board of Indian Commissioners, reported that the Navajos were then encroaching upon the Hopis as they were when he was in the area in 1911. "The Hopi looks in vain to the Department for protection," he wrote, "for although aware of this condition for many years the Government has continued to neglect its duty in providing a remedy."

On January 7, 1925, Inspector A. L. Dorrington filed a report in which the old story was repeated. ". . . the Navajo Indians," he wrote, "do not recognize any boundaries and have persistently and continuously for fifty years or more crowded the Hopi Indians back and back, until they are now confined to comparatively small area immediately adjoining their mesas. . . ."

During all of these years the Government, while failing to protect the Hopis from the Navajos, was urging the Hopis to come down off of the mesas.[82] Despite this lack of protection Government officials more than once chided the Hopis for clinging to the mesa tops. In his report of June 22, 1914, Crane in effect stated that the Hopis were to blame for their troubles. Whereas the Navajos had an "industrious pushing nature," Crane observed, the Hopis, through indifference, timidity or superstition, persistently clung to the mesas.

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[82] As early as January, 1886, Thomas V. Keam had recommended to the Commissioner of Indian Affairs that the Hopis be encouraged to move down off of their mesa tops to the nearby valleys so that they would be closer to their farms and sources of water. To assist in this, it was his suggestion that the Government supply the Hopis with building materials to enable them to build wood homes in place of their adobe pueblo dwellings. The Government accepted this suggestion and the first two Hopi families moved down off of the mesas in 1888.

In his report of June 6, 1916, Traylor placed much of the blame for Navajo encroachments upon territory "rightfully" belonging to the Hopis, upon the Hopis themselves. He characterized the Hopi as "the most pitiable and contemptible coward who now lives upon the face of the earth."[83]

In the late 1920's and early 1930's the Hopis, overcoming their fears of the Navajos, and yielding to the constant urging of Government officials, began to come down off of the mesas and spread beyond their previous area of occupancy.[84]

On January 16, 1928, Miller reported that during the previous year:

> "... the Hopis have spread out so much, and we have located so many so far afield—and at such distances from their mesas—in new territories, that additional friction and misunderstanding has developed, and more determined opposition from the Navajos has been encountered. ..."

On July 12, 1930, Agricultural Extension Agent A. G. Hutton reported that, "the Hopi is crowding into territory that has been used entirely by the Navajos in the past. ..."

On July 25, 1930, Field Representative H. H. Fiske reported that the efforts of the Government over a long period of time to induce the Hopis to move down from the mesa villages was resulting in some gradual but increasing success.

But now that the Hopis, who had previously been labeled cowards for not coming down off of the mesas, saw fit to do so at Government urging, they were officially labeled "aggressors" and "trespassers" for doing so. In his report of July 25, 1930, Fiske stated that now the Hopis rather than the Navajos, were the aggressors. In their report of November 20, 1930, H. J.

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[83]Traylor added:

> "Were he otherwise than the coward that he is, he would prefer to die fighting rather than to surrender the resources of his territory to an enemy."

[84]There had apparently been some substantial expansion of the Hopis as early as 1917. Speaking of this period, Asdzaan Tsedeshkidni, a ninety-year-old Navajo woman, testified that about this time she and her family had been living in the reservation near Beautiful Mountain, where they had developed a spring. She testified that then we "heard the rumble of the Hopi hoes," as the latter began developing little farms in the area. So she and her family moved across Dinnebito Wash.

Hagerman and Chester E. Faris agreed with the view which had previously been expressed by Miller, Hutton and Fiske that most of the then-current "trespassing" was by the Hopis rather than the Navajos.

After the official settlement of Navajos in the 1882 reservation, the failure of the Hopis to make substantial use of the area beyond district 6 was not due to a lack of desire or a disclaimer of rights on their part. It was due to the fact that the Office of Indian Affairs, through its grazing regulations and associated permit system, was exerting the power of the Government to prevent any Hopi expansion into the area into which Navajos by then were solidly entrenched.

The administrative exclusion of Hopi Indians, without their approval and against their wishes, from that part of the 1882 reservation lying outside of district 6 was, for the reasons already stated, at all times illegal.[85] The Office of Indian Affairs was aware of this because the solicitor's opinion of February 12, 1941, reconfirmed by the acting solicitor's opinion of June 11, 1946, 59 I.D. 248, so advised. Yet the exclusion practice continued year after year and was, in fact, intensified.

But despite this obstacle over which the Hopis had no control, they continued to assert their right to use and occupy the area from which they were barred.

At a Senate subcommittee hearing held at Keams Canyon in May, 1931, the Hopi tribal delegates insisted that the 1882 reservation should be for the exclusive use of the Hopis and that all Navajos should be moved out.

On August 6, 1932, a conference of sixty-eight Hopis, meeting at Oraibi, Arizona, protested against the inclusion in the Navajo Indian Reservation Act then under consideration, of a proviso which would have given the Secretary of the Interior authority to determine and set apart for the exclusive use of the Hopis, only a portion of the 1882 reservation.

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[85]Pertinent here is the following comment, documented by other instances of illegal Governmental rule on page 309 of the Handbook of Federal Indian Law by Felix S. Cohen, published in 1945:

> "Tribal possessory right in tribal land requires protection not only against private parties but against administrative officers acting without legal authority and against persons purporting to act with the permission of such officers. . . ."

On February 13, 1933, Otto Lomavitu, then President of the Hopi Tribal Council, wrote to Hopi Agency Superintendent Miller, asserting Hopi rights to the 1882 reservation "though occupied by the Navajos."

At a special meeting of the Hopi Tribal Council, held at Oraibi on October 5, 1937, a resolution was passed to the effect that, for several stated reasons, the land management districts should not be recognized. One of these reasons was that ". . . the Hopi people have not conceded any part of their reservation to the Navajos."

At a conference between Commissioner Collier and fifteen Hopi Tribal Council members and four Hopi chiefs, held at Oraibi on July 14, 1938, the statement was made for the Hopis that they considered the Navajos on the reservation as trespassers, that the entire 1882 reservation belonged to the Hopis, and that to prevent any misunderstanding as to this the 1882 boundary lines should also be made the boundary lines of district 6.

On April 24 and 25, 1939, four Hopi leaders met in Washington with the Commissioner, at which time the Hopis presented a map showing the "sacred area" that the Hopi people desired. The map showed an area much larger than the 1882 reservation. But the Hopis also asked, as a bare minimum, that they be recognized as having exclusive rights in the entire 1882 reservation.[86]

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[86]This was one of many instances in which the Hopis, in addition to claiming all of the 1882 reservation, also laid claim to vast areas beyond that reservation. These so-called "traditional" claims are explained, as Dr. Harold S. Colton reported to a Senate subcommittee on May 20, 1931, by a desire on the part of so-called "orthodox" Hopis to own or control the holy places and shrines where groups of Hopis had worshipped for centuries past.

These shrines are found from Navajo Mountain to the Little Colorado, and from the San Francisco Mountains to the Luckachukas. The Hopi village of Hotevilla, basing its position upon an ancient stone record in the possession of the village chief, apparently claimed the North American continent, from ocean to ocean.

While these claims to an extended area were based on Hopi tradition, the fact that claims based on ancient rites were made was by no means unique with the Hopis. It was common for Indian tribes to claim, on such grounds, an area of land much larger than their reservations. As a matter of fact the boundary claimed by the Navajos at one time extended to the city of Albuquerque, New Mexico and included the Jicarilla Apache Reservation.

Early in 1942, the Hopis sought to make a test case out of their disagreement with the practice of denying permits to district 6 Hopis for use of lands outside of district 6. At that time they submitted 105 applications by Hopi stockmen for grazing permits on range lands outside of district 6. Navajo Superintendent Fryer returned all of these applications "without action" on February 27, 1942.

Byron P. Adams, then Chairman of the Hopi Tribal Council, approved the Centerwall report of July 29, 1942. That report contained the statement that the setting aside of a land management unit for the Hopis does not create a reservation boundary and that the Hopis would remain entitled to all beneficial use, including the right to any proceeds, within the remainder of the 1882 reservation.

Commissioner Collier met with Hopi leaders at Oraibi on September 12, 1944, at which time the Hopi claims to the entire 1882 reservation were once more aired.

In April, 1945, the Hopi chiefs of the Second Mesa in the 1882 reservation protested to Senator Burton K. Wheeler against the fencing of district 6. At a meeting held on November 6-7, 1945, at the Tareva Day School, in the reservation, Hopi leaders in effect told officials of the Office of Indian Affairs that the Hopis continued to claim the 1882 reservation lands outside of district 6.

Perhaps these Hopi claims subsequent to the settlement of Navajos would have been even more persistent and vehement had it not been for the constant assurances given to them by Government officials, that their exclusion from all but district 6 was not intended to prejudice the merits of the Hopi claims.

It is true that, as a practical matter, the entirely valid settlement of Navajos in the part of the 1882 reservation outside of district 6, even without the illegal restraint which the Government placed upon the Hopis, would have greatly limited the amount of surface use the Hopis could have made of the outer reaches of the reservation. Though Hopi and Navajo rights of use and occupancy were equal, members of both tribes could not physically utilize the same tract at the same time. This was a hazard to which the Hopis were at all times subject because of the authority reserved in the Secretary to settle other Indians in the reservation.

But without such Governmental restraint and without Navajo pressure in becoming joint occupants there would unquestionably have been a substantial movement of Hopis into the area outside of district 6, which they presumably would have still been using and occupying on July 22, 1958. Moreover, with or without such restraint, the Hopi rights in subsurface resources were not affected, either as to legal standing or practical opportunity to exploit.[87]

Defendant calls attention to Article I of the Hopi Constitution, adopted by the Hopis on October 26, 1936, and approved by the Secretary on December 19, 1956. It appears to be defendant's view that Article I of that Constitution amounts to a voluntarily accepted limitation upon the jurisdiction of the Hopi Tribal Council, confining such jurisdiction to the area of the Hopi villages and such other lands as might be added thereto by agreement with the Government and the Navajo Indian Tribe.

In his opinion of February 12, 1941, the solicitor relied upon this and two other provisions of the Hopi Constitution as requiring disapproval of the proposed Secretarial order dividing the 1882 reservation into areas of Hopi and Navajo exclusive occupancy.[88]

We agree with the solicitor's conclusion. The Hopi Constitution does not itself provide an affirmative foundation for the Hopi claim to an interest in the entire reservation. It does, however, negate the contention that the Hopis had abandoned or otherwise surrendered their asserted rights therein.

We therefore conclude that neither before nor after the Secretarial settlement of Navajos, did the Hopis abandon their previously-existing right to use and occupy that part of the 1882 reservation in which Navajos were settled.

For the reasons stated above, Hopi rights of use and occupancy in that part of the reservation were not terminated by Congressional enactment, administrative action, or abandonment. This would appear to require the conclusion that the Navajo Indian Tribe does not have an exclusive interest in the part of the

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[87]See the opinion of acting solicitor Felix S. Cohen, dated June 11, 1946. 59 Dec. Dept. Int., 248.

[88]See note 48 above, at the end of which this part of the solicitor's opinion is quoted.

reservation in which it has been settled, but has only a joint, undivided, and equal interest therein with the Hopi Indian Tribe.

But defendant points out that, unless the Navajo Indian Tribe is held to have an exclusive interest in that part of the 1882 reservation lying outside of district 6, it will not be possible in this action to completely divide the reservation between Hopis and Navajos. Arguing that it was the purpose of Congress in passing the Act of July 22, 1958, to obtain such a division of the reservation, defendant urges us to fulfill this purpose by declaring that the Navajos have such an exclusive interest.

It was indeed the hope and probably the expectation of the Congressional sponsors of the legislation that this litigation would result in a clear-cut division of the reservation, leaving no undisposed issues.[89] Thus, at the hearing on June 18, 1958, before the House Committee on Interior and Insular Affairs, held on S. 692 and H.R. 3780, the then Congressman Udall stated that: ". . . it is either a matter of Congress attempting to determine the boundaries which would be an impossible situation, or having a judicial determination."[90]

But the fact that Congress hoped and expected that this litigation would put an end to the Navajo-Hopi controversy does not warrant the court in disregarding facts and law which

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[89]The jurisdictional statute was first introduced on July 16, 1956, by Senator Goldwater, as S. 4086, 84th Cong. That bill passed the Senate but not the House. Similar measures were introduced in both the Senate and House in the 85th Congress. S. 692, 85th Cong., was introduced by Senators Goldwater and Hayden. H.R. 3789, 85th Cong., was introduced by Congressman Udall.

[90]Later during this hearing the following colloquy occurred:

"Mr. Saylor. The next question is:

"Since the purpose of this bill is to determine the rights of both the Navaho and Hopi Tribes, does the committee expect there will be a division of the lands in question?

"Mr. Udall. The legislation so provides, that the Court will make determination where the boundary lies, and the lands that are determined to belong to the Navaho will go to the Navaho, and you will have a new boundary determined.

"Mr. Saylor. In other words, instead of the existence of this no-man's land we have right now, where both tribes do not know what their jurisdiction is, when the decision of the Court is arrived at there will be a section of it probably set aside for the Hopi and a certain section set aside for the Navaho?

"Mr. Udall. That is exactly the case."

dictate a different result. Congress appreciated this, as revealed by the language of the 1958 act, and its pertinent legislative history.

The act places no mandatory duty on this court to accomplish a complete division of the reservation, as between Hopis and Navajos. Lands, "if any," in which the Navajo Indian Tribe or individual Navajo Indians are determined to have an exclusive interest are henceforth to be a part of the Navajo Indian Reservation. Lands, "if any," in which the Hopi Indian Tribe, including any Hopi village or clan thereof, or individual Hopi Indians are determined to have an exclusive interest are thereafter to be a reservation for the Hopi Indian Tribe. But there is no direction that all reservation lands must be classified as exclusively Navajo or exclusively Hopi, or that lands which were neither exclusively Navajo or Hopi must nevertheless be distributed to one tribe or the other.

This goal could have been realized if the bill had been enacted in its original form. Section 2 of the bill, as introduced, provided that:

> ". . . (1) any lands in which the court finds that the Navaho Tribe or individual Navahos have the exclusive interest shall thereafter be a part of the Navaho Reservation, (2) any lands in which the court finds that the Hopi Tribe, village, clan, or individual has the exclusive interest shall thereafter be a reservation for the Hopi Tribe, and (3) any lands in which the Navaho and Hopi Indians have a joint or undivided interest shall become a part of either the Navaho or the Hopi Reservation according to the court's determination of fairness and equity. . . ."

Referring to section 2, as it was then worded, Hatfield Chilson, Assistant Secretary of the Interior, made this comment to Congressman Clair Engle, Chairman of the House Committee on Interior and Insular Affairs, in a letter dated February 26, 1957:

> ". . . This provision will assure that one or the other of the tribes will have administrative jurisdiction over the land in the future, without prejudice, however, to the undivided interests."[91]

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[91] Page 5 of House Report No. 1942, 85th Cong., 2nd Sess., dated June 23, 1958, to accompany S. 692, 85th Cong., (which became the Act of July 22, 1958).

The department thus recognized that the court might find that some reservation lands were held jointly rather than exclusively by one tribe or the other. But since the bill, in its original form, provided for the distribution of jointly-held lands as well as exclusively-held lands, a complete division of the reservation would nevertheless have been attained. The distribution of the jointly-held lands, if any were found to be so held, would have been in the nature of a judicial partition of lands then vested by reason of the trust declaration under the first section of the act.

But then it was decided to delete the provision which would give the court power to distribute jointly-held land. This was accomplished by amending the bill to strike the third numbered clause contained in the above-quoted part of section 2 of the bill. The request for this revision came from the department, in a letter from Chilson to Honorable James A. Haley, Chairman of the subcommittee. The reason given for this deletion was as follows:

> ". . . The purpose is to leave for future determination the question of tribal control over lands in which the Navahos and Hopis may have a joint and undivided interest. The two tribes feel that this question cannot be adequately resolved until the nature of their rights is adjudicated, and that the question is properly one for determination by Congress rather than by the courts. We agree with that position. Until the nature of the respective interests is adjudicated it is difficult to determine whether any part of or interest in the lands should be put under the exclusive jurisdiction of either tribe."[92]

It thus appears that the reference to "joint and undivided" interests was omitted not because the court was to be precluded from finding such interests. Rather, it was because of the feeling that if joint and undivided interests were found to exist, the court ought not to be given the further duty, under the deleted clause 3, to distribute such lands between the two reservations, "according to the court's determination of fairness and equity."

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[92]Page 6 of House Report No. 1942.

In Chilson's letter of March 19, 1957, the reason given why this additional function should not be placed upon the court was that the two tribes felt that, as to any joint and undivided interests found to exist, the question of a partition or other disposition thereof "is properly one for determination by Congress rather than by the courts."[93]

In commenting upon this amendment, Perry W. Morton, Assistant Attorney General, told the Senate Committee on April 1, 1957, while H. R. 3789, 85th Cong., was under consideration:

> ". . . The very fact that the sentence now proposed to be deleted is in the bill assumes that there must be, possibly at least, some land in which these two organizations have a joint or undivided interest. If the court is to proceed upon

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[93]An explanation as to why the parties and the Department thought it would be better for Congress, rather than the court, to distribute lands found to be held jointly, was made by Lewis Sigler, Legislative Division, Office of the Solicitor, when he appeared before the House Committee considering H.R. 3789, 85th Cong., at a hearing held on April 2, 1957, as follows:

> "Under the Department's present position, that is, the Solicitor's opinion of 1946, those rights are now vested in the Hopi Tribe, and in individual Navahos jointly. That may or may not be a correct conclusion as a matter of law. The Navaho Tribe, as I understand it, is now differing with that position, and asserting that the rights are not in the individual Navahos, but are in the tribe. The Hopis, however, are still insisting that whatever rights there are are in the individual Navahos, rather than the tribe. So that is one of the issues still in dispute.
>
> "Because of that dispute, and because it is possible that the court might aware [sic] the surface to one group and the subsurface to another group, we propose omitting this sentence which would define what happens to the lands in which there are joint interests, if that happens to be the end result.
>
> "I should indicate that was the suggestion of both Mr. Boyden as a representative of the Hopis, and Mr. Littell as a representative of the Navahos, that if there should be such joint interest adjudicated, then Congress ought to take another look at it to decide where to put the joint interests.
>
> "I should indicate, in all fairness, that both the Navahos and the Hopis, I think, will contend there are no joint interests, they are exclusive one way or the other. But you cannot rule out the possibility there will be a decision of joint interest."

the basis of exclusive occupancy, then how can there be a joint or undivided interest?"[94]

The applicable facts and law of this case do not permit of a declaration that one tribe or the other has the exclusive interest in all of the 1882 reservation; or that all of the 1882 reservation is divisible into areas of exclusive interest for one tribe or the other. The only part of the reservation which may be, and herein is, so classified is the district 6 area, as defined on April 24, 1943, the Hopi Indian Tribe having the exclusive interest therein. As to the remainder of the reservation, the Hopi and Navajo Indian Tribes have joint, undivided, and equal interests as to the surface and sub-surface including all resources appertaining thereto, subject to the trust title of the United States.

It is just and fair in law and equity that the rights and interests of the Hopi and Navajo Indian Tribes be determined in the manner just stated, and that the respective titles of the two tribes in and to the lands of the 1882 reservation be quieted in accordance with that determination.

It has been the consistent position of the defendant throughout this suit that the Navajo Indian Tribe has the exclusive interest in all of the 1882 reservation lying outside of the area described on page 2 of Pre-Trial Order No. 2. In that pre-trial order he also took the position that "No other interests were asserted" by defendant than those described. During the pre-trial hearing which led to the entry of Pre-Trial Order No. 2, counsel for defendant twice stated that defendant made no claim to a joint interest in any part of the reservation.

In our view, however, this disclaimer of any Navajo joint interest, does not preclude this court from judicially determining

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[94]Lewis Sigler of the solicitor's office, appearing before the House Committee on April 15, 1957, also advised of the possibility that the court might find some joint-user. He told the committee:

"If the courts decide, of course, that there are exclusive rights in either group, then the two sentences that are left in the bill will take care of it. It is only in the event there is this split ownership adjudicated that the feeling was Congress ought to take a look at the nature of that split ownership before it decided which tribe would get the control."

that the Navajo Indian Tribe has a joint interest in a part of the reservation, as we have concluded, if the facts and law warrant such a determination and do not permit an adjudication that the Navajo Indian Tribe has an exclusive interest in such part.

Conclusion

Under the judgment being entered herein about one quarter of the 1882 reservation, consisting of district 6 as defined in 1943, will be completely removed from controversy, having been awarded exclusively to the Hopi Indian Tribe. As to the remainder of the reservation, the facts and law, as herein determined and applied, and our lack of jurisdiction to partition jointly-held lands, preclude a complete resolution of the Hopi-Navajo controversy.

But even as to this remaining part of the reservation in which the two tribes are herein held to have joint, undivided and equal rights and interests, the judgment will have the effect of narrowing the controversy. At least three crucial questions which have heretofore hampered a fair administration of this part as a joint reservation, or a division thereof by agreement or Congressional enactment, have now been settled. No longer will it be tenable for the Hopis to take the position that no Navajos have been validly settled in the reservation. No longer will it be tenable for the Navajos to take the position that they have gained exclusive rights and interests in any part of the reservation. No longer will there be uncertainty as to the boundaries of the area of exclusive Hopi use and occupancy.

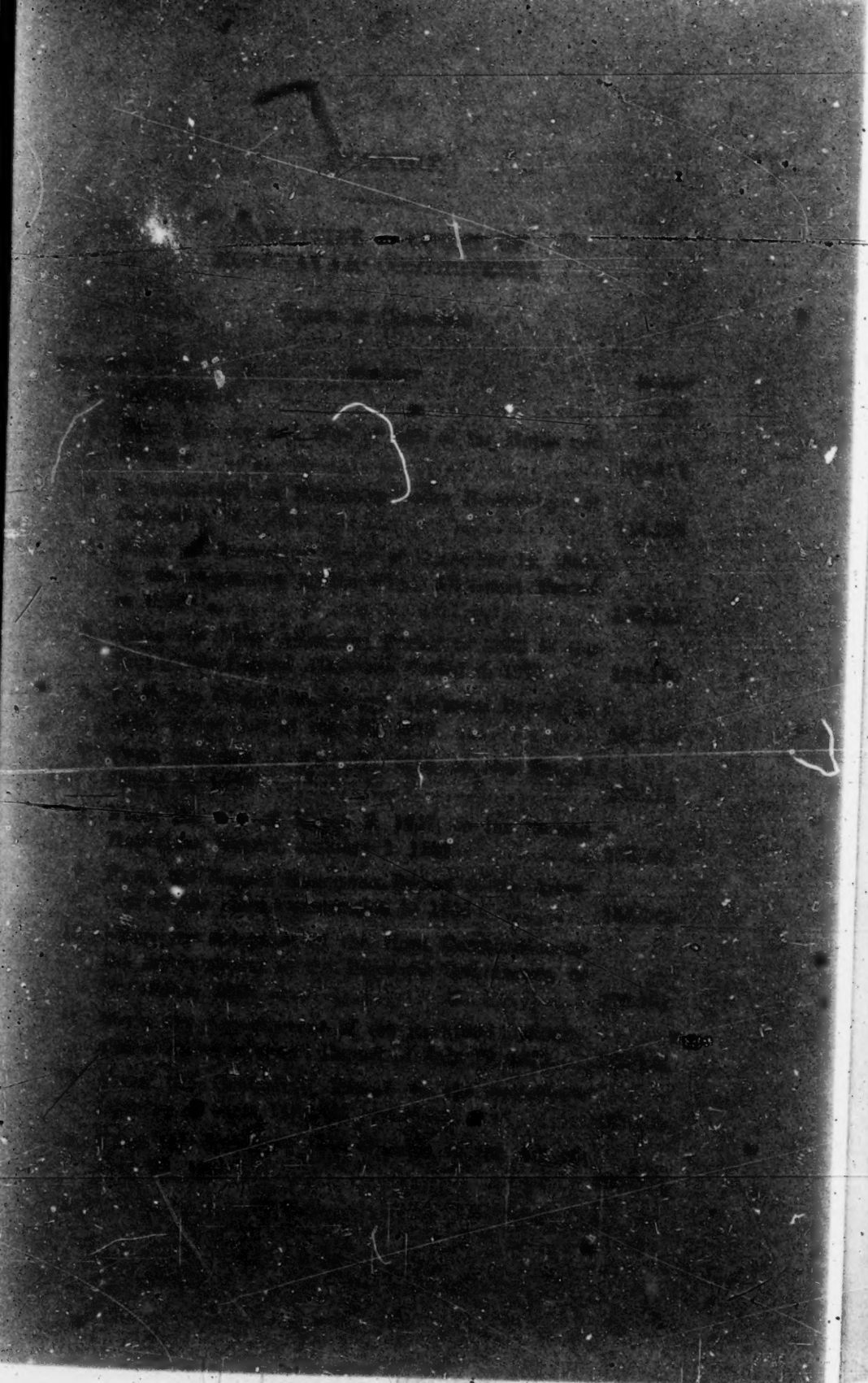
It will now be for the two tribes and Government officials to determine whether, with these basic issues resolved, the area lying outside district 6 can and should be fairly administered as a joint reservation. If this proves impracticable or undesirable, any future effort to partition the jointly-held area, by agreement, subsequently-authorized suit, or otherwise, will be aided by the determination in this action of the present legal rights and interests of the respective tribes.

In the course of this opinion it has been necessary to say some unkind things about the activities of the Navajo Indians in the reservation area in years long past. We wish to make it clear that the record contains nothing concerning the conduct of the

Navajos in this area in recent years with which they can be reproached. They as well as the Hopis are now conducting themselves as good citizens of which the West and the nation can be proud.

FREDERICK G. HAMLEY, Circuit Judge
LEON R. YANKWICH, District Judge
JAMES A. WALSH, District Judge

September 28, 1962



APPENDIX

NARRATIVE ACCOUNT OF HOPI-NAVAJO CONTROVERSY

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1.

Introduction

The following chronological account of the Hopi-Navajo Indian reservation controversy is based upon the evidence received in ***Healing v. Jones,*** Civ. 579, Prescott, tried in the United States District Court for the District of Arizona in the fall of 1960. In its separately-prepared findings of fact entered in this case the court has not only appraised the evidence reviewed in this account, but has also considered a vast amount of additional evidence which is not referred to herein. In its accompanying opinion discussing questions of fact and law the court has referred to and commented upon some of the evidence summarized in this narrative recital.

The marginal notations refer to the record and documents in the case. "Plf.," and "Def.," refer to the bound books of documentary exhibits introduced by plaintiff and defendant. "Prop. F.F.," refers to proposed findings of fact submitted by the parties. "Object.," refers to objections filed against proposed findings of fact. "R." refers to the transcript of the testimony. "Plf. Ex." and "Def. Ex." refer to exhibits other than bound books of documentary exhibits. "Br." refers to the briefs filed by the parties.

2.

Early History and Way of Life of the Hopis and Navajos

The Hopis are a remnant of the western branch of the early house-building race which once occupied the southwestern table lands and canyons of New Mexico and Arizona. Before 1300 A.D., and perhaps as far back as 600 A.D., the ancestors of the Hopis occupied the area between Navajo Mountain and the Little Colorado River, and between the San Francisco Mountains and the Luckachukas. Def. 88 Plf. 299 Def. 818

No Indians in this country have a longer authenticated history than the Hopis. As early as 1541, a detachment of the Spanish Conqueror, Coronado, visited this region and found the Hopis living in mesa villages, cultivating adjacent fields, and tending their flocks and herds. In 1692 another Spanish officer, Don Diego De Vargas, visited the area where he met the Hopis and saw their villages. American trappers encountered the Hopis in 1834. Plf. 299 Def. 61 Plf. 7 Plf. 1

In 1848, by the Treaty of Guadalupe Hidalgo, 9 Stat. 922, this area came under the jurisdiction of the United States.

Pif. 42
Def. 85
Def. 310

In 1882, the Hopis numbered about two thousand and lived for the most part in seven villages situated on three mesas in northeastern Arizona. The level summits of these mesas are about six hundred feet above the surrounding sandy valleys and semi-arid range lands. These lands are at an elevation of from six thousand to seven thousand feet above sea level.

Pif. 27

Def. 89
Def. 103

In the nearby valleys the Hopis maintained vegetable gardens, grain fields and orchards to the extent of about six or seven thousand acres. The Hopis also raised livestock, then numbering about 10,500 head, which were grazed on the range lands but close enough so they could be driven back each night to the walls of the mesas.

Def. 62

Def. 837

The Hopis did not hold the farm lands adjacent to their villages in individual ownerships, but by a clan block system which amounted to communal ownership. There were a number of named clans, the first one established being the Bear clan, settled near the spurs of the first and second mesas. Within the clan, authority to grant use of land was vested in the "clan mother," who allotted planting areas and settled disputes. Land disputes between clans were presumably settled by the Kikmongwo, who were usually members of, or affiliated with, the Bear clan.

The clan block system was the predominant pattern until late in the 1800's. The pattern of land use changed considerably after 1900, although there were still traces of clan land holdings in the Oraibi Wash as late as 1906.

Def. 119
Pif. 255
Def. 61
Def. 89
Def. 6
Pif. 25

The village houses, grouped in characteristic pueblo fashion, were made of stone and mud, two, three, and sometimes four stories high. Water had to be brought by hand from springs at the foot of each mesa. The Hopis were a timid and inoffensive people, peaceable and friendly with outsiders. They were also intelligent and industrious although their working time was frequently interrupted by lengthy religious ceremonials and tribal dances.

Def. 62

The Hopi men tended the gardens, fields and orchards, and took care of the livestock and poultry. They did some hunting, mainly for rabbits. The Hopi women ground corn, did the cooking and other household tasks, hauled most of the water, repaired

the houses, and made pottery. Both the men and women did weaving and knitting.

Throughout the entire area which was later to be designated as the 1882 reservation the Hopis had numerous ceremonial shrines and several ceremonial fox trapping areas, which they had maintained and visited for hundreds of years. Some Hopi shrines, moreover, were to be found far beyond this area, and as far away as the San Francisco Peaks, to the west, and Chevalon Creek, southeast of Winslow to the south. These remote shrines, however, were for the most part abandoned over the course of the years. Plf. Ex. 244 Def. 678

These Hopi shrines were of two kinds, the Kachina shrines and the Eagle shrines. The Kachina shrines were the same for all Hopi mesas and clans, but the Eagle shrines belonged to one or the other of the clans of the different pueblos. Def. Prop. F. F. p. 286

Eagle shrines were associated with the collection of young eagles from the eagle nests in the cliffs, at least one eagle always being left in the nest. The hunting of eagles was accompanied by rituals involving the use of corn pollen and prayer sticks, conducted at a particular site before the young eagles were seized. The young eagles were then taken back to the villages, raised to a certain size when they were killed, and the feathers used for ceremonial purposes. Def. 679 R. 282

A government agency with headquarters at Keams Canyon, twelve miles east of the nearest Hopi village, was established for the Hopis in 1863. They had no reservation prior to December 16, 1882. Plf. 7 Def. 1. Def. Object. p. 2, 7

The recorded history of the Navajos does not extend as far back as that of the Hopis. They were apparently not seen by the Spanish explorers of the Southwest in the sixteenth century. During this early period they may have been scattered agricultural tribes or they may have migrated to the Southwest somewhat later with the Apaches from the north. They are mentioned in preserved journals for the first time in 1629. From all historic evidence it appears that the Navajos entered what is now Arizona in the last half of the eighteenth century. Def. 300

By 1854 there were at least eight thousand Navajos residing on the tributaries of the San Juan River, west of the Rio Grande and east of the Colorado, and between the 35th and 37th parallels of north latitude. In 1863 Col. Christopher ("Kit") Carson led Plf. 4

a force which rounded up several thousand Navajos and interned them at Bosque Redondo, on the Pecos River, near Fort Sumner, in New Mexico.

In 1868, the United States entered into a treaty with the Navajos (15 Stat. 667), under which the latter were granted an extensive reservation to the east of what was to become the executive order reservation of December 16, 1882. The Navajos therein agreed to relinquish all rights to occupy any territory outside that reservation, but retained a limited right to hunt on unoccupied contiguous lands. The Navajos were thereupon released from their internment near Fort Sumner and moved to the newly-created reservation. Added to those who had escaped internment there were then between twelve and thirteen thousand Navajos. By 1882 the population of the Navajos had grown to about sixteen thousand.

Pif. 13
Def. 306
Pif. 79
Def. 25, 35, 45, 51
Def. 903

In the treaty of 1868, the western boundary of the Navajo reservation was not defined with precision. This was accomplished, however, by an executive order issued on October 29, 1878, the western line being fixed as ". . . the one hundred and tenth degree of longitude west, . ." This line was later to become the eastern boundary of the December 16, 1882 reservation. Additional land was added to the southwest corner of the Navajo reservation by another executive order issued on January 6, 1880. With this addition, the Navajo reservation amounted to about 11,875 square miles, or eight million acres.

Pif. 30
Def. 80
Pif. 31
Def. 95

Despite the vast size of the Navajo reservation at that time, this semi-arid area was considered incapable of providing support for all of the Navajos. Moreover, except for one or two places, the boundaries of the Navajo reservation were not distinctly marked. In addition, the new treaty obligations and increased pressure by white immigrants from the Rio Grande valley had forced the Navajos to abandon, to a large degree, their old territory in the Mount Taylor-Chaco Canyon region.

Def. 20
Def. 38
Def. 839.

It is therefore not surprising that great numbers of the Navajos wandered far beyond the paper boundaries of the 1868 reservation as enlarged by the executive orders of 1878 and 1880. By 1882, Navajos comprising hundreds of bands and amounting to about half of the Navajo population had camps and farms outside the reservation and as far from it as 150 miles. Some Navajo groups which had pressed westward because

Def. 19, 20
Def. 37

of droughts were attracted to the Hopi country to trade for corn and melons. These groups settled in the Jeddito Valley and on Black Mesa, where water was available.

The Navajos were originally of an aggressive nature though not as warlike as the Apaches. It was because they had become embroiled in a series of fights with white men, including forces located at United States Army outposts, that they were banished to Fort Sumner in 1863. By 1882, however, they had curbed their hostility to the Government and to white men and, in general, were peaceably disposed. As hereinafter described, however, there was little abatement of their proclivity to commit depredations against the Hopis, although such activities were not ordinarily accompanied by violence. Pif. 4 Def. 28, 35, 57

Desert life made the Navajos sturdy, virile people, industrious and optimistic. They were also intelligent and thrifty and some pursued trades which made them wealthy. Def. 312 Pif. 57

Some Navajos established farms which held them to fixed locations. In the main, however, they were semi-nomadic or migratory, moving into new areas at times, and then moving seasonally from mountain to valley and back again with their livestock. This required them to live in rude shelters known as "hogans," usually built of poles, sticks, bark and moist earth. It was their practice to keep these hogans on a permanent basis and to return to them when this was practicable. Def. 37 Pif. 57 R. 298

The Navajos as well as the Hopis had sacred places both within and without the area which later became the 1882 reservation. These were, for the most part, eagle-catching shrines, but the Navajos probably had less need than the Hopis for the use of eagle feathers in their ceremonials. Def. Prop. F.F. 285

The Navajos maintained closely-knit families and each member identified himself with the hogan in which he was born according to the Navajo ceremonial called the "Blessingway." As Navajos moved from place to place their belongings were usually carried on pack ponies. This kind of life necessarily curtailed agricultural pursuits, but many nevertheless were able to grow corn, wheat and other farm products. Def. Br. 48 Pif. 57 Pif. 3, 4

While hunting was a principal activity in earlier days, by 1882 it was not extensively engaged in by the Navajos. Their prime means of livelihood was the raising of livestock. In the Def. 35

early 1880's they were said to own 800,000 sheep, 250,000 horses, and 300,000 goats. The Navajos manufactured their own clothes, principally from wool, and were expert at blanket making.

3.

Establishment of Executive Order Reservation of December 16, 1882

The first suggestion that a reservation be created which would include any of the lands here in question came from Alex G. Irvine, who was then United States Indian Agent at Fort Defiance, Arizona Territory. On November 14, 1876, he recommended to the Commissioner of Indian Affairs of the Department of the Interior that a reservation of fifty square miles be set apart for the Hopis. His reason for making this recommendation was the necessity of protecting the Hopis from Mormon pressure from the west and south, and of providing more living space because of increasing Hopi and Navajo population.

On May 13, 1878, William R. Mateer, then United States Indian Agent for the Hopis, at Keams Canyon, recommended that a reservation extending at least thirty miles along the Colorado River be set apart for the Hopis. Neither of these recommendations drew any response from the Office of Indian Affairs.

In his annual report of August 24, 1878, Mateer recommended the removal of the Hopis to a point on the Little Colorado River which was outside of what later became the reservation of December 16, 1882. He stated as his reason for making this recommendation the fact that the Navajos were spreading all over that country within a few miles of the Hopis and were claiming, as their own, the only areas where there was water and which were worth cultivating.

A year later E. A. Hoyt, Commissioner of Indian Affairs, asked Mateer to make an early report with the view of establishing a suitable reservation for the Hopis. Mateer resigned soon after these instructions were received and his requested report was never forthcoming.

On March 20, 1880, Galen Eastman, Mateer's successor as Hopi Indian Agent, wrote to the Commissioner, urging that a reservation forty-eight miles east to west and twenty-four miles north to

south, embracing the Hopi villages, be set aside for the Hopi Indians. In his communication Eastman rejected, as impracticable, Mateer's suggestion that the Hopis be moved to a new locality. Eastman expressed the view that the Hopis needed a reservation because the settlement of Mormons in the vicinity was "imminent." Def. 16

Nothing came of Eastman's recommendation and another two years were to pass before the matter of establishing a reservation in this area again became active. On March 27, 1882, J. H. Fleming, then the United States Indian Agent at the Hopi Agency, wrote to the Secretary of the Interior recommending that a "small" reservation which would include the Hopi pueblos, the agency buildings at Keams Canyon, and sufficient lands for agricultural and grazing purposes, be set aside for the Hopis. He stated that such a reservation was needed to protect the Hopi Indians from the intrusions of other tribes, Mormon settlers, and white intermeddlers. Def. 17 Def. 17

In the summer of 1882, United States Indian Inspector C. H. Howard visited the general area in the course of an investigation of Navajo problems. On July 14, 1882, he wrote to the Secretary of the Interior stating that he would have important recommendations to make concerning the combination of the Hopi and Navajo Agencies, especially with reference to the "immense" number of Navajos living off of their reservation. Def. 19

Two weeks later, on July 31, 1882, Howard wrote to the Secretary recommending that a new reservation be set aside for the "Arizona Navajos," and for the Hopis whose seven villages would be encompassed by the proposed new reservation. On October 25, 1882, Howard made an extensive report to the Secretary, renewing his suggestion that a joint reservation be established for the western Navajos and Hopis. A third Howard report, renewing this recommendation, was not completed until December 19, 1882, and so could not have been considered in drafting the Executive Order of December 16, 1882. Def. 25, 39 Def. 58, 74

The reservation envisioned by Howard was a much larger one than Fleming had in mind. His stated reason for including the Arizona Navajos in the reservation was to contain, within newly-created boundaries, the great number of Navajos who were then roaming far beyond their then established reservation. His reasons for including the Hopis were to protect them from en- Def. 21

croaching white settlers and from being "constantly overridden by their more powerful Navajo neighbors."

Pltf. Prop. F.F. 8, p. 9

Howard's assertion, that the Hopis were "constantly" overridden by the Navajos is borne out by authentic reports extending back to 1846. In that year and in 1850, 1856, 1858 and 1865, civil and military officials reported instances in which Navajos had trespassed upon Hopi gardens and grazing lands, seized and carried away livestock and committed physical violence.

Pltf. 1, 2, 6, 9.

None of the recommendations for the establishment of a new reservation were immediately acted upon. In the meantime, however, Fleming wrote to the Commissioner under date of October 17, 1882, advising that he had expelled one Jer. Sullivan, a white meddler, from the Hopi villages, and requested authority for soldiers to expel E. S. Merritt, another white meddler. A notation added to this letter after it reached Washington called attention to the fact that the Hopis were not on any reservation and that there was apparently no authority to take steps against Sullivan or Merritt.

Def. 23

Def. 24

Def. 54, 55, 56

The Commissioner accordingly replied to Fleming advising that Sullivan should be allowed to gather his crops and no steps should be taken against Merritt. On November 11, 1882, Fleming reported that Sullivan had returned to the Hopi area and had asserted that the Government could not remove him because the pueblos were not on a reservation. Fleming stated that if a way could not be found to get Sullivan and Merritt away from the Hopi villages, he would tender his resignation.

Def. 57

On November 27, 1882, Commissioner H. Price sent a telegram to Fleming asking him to describe boundaries "for a reservation that will include Moquis villages and agency and large enough to meet all needful purposes and no larger, . . ." Fleming responded by letter dated December 4, 1882, specifying, as the boundaries of the proposed reservation, the lines which were later described in the Executive Order of December 16, 1882.

Def. 21

The proposed reservation thus described was much smaller than had been suggested in the joint reservation proposal of Howard. In his letter of December 4, 1882, Fleming said, among other things:

> "The lands most desirable for the Moquis, & which were cultivated by them 8 or 10 years ago, have been taken up by

the Mormons & others, so that such as is embraced in the prescribed boundaries, is only that which they have been cultivating within the past few years. The lands embraced within these boundaries are desert lands, much of it worthless even for grazing purposes. That which is fit for cultivation even by the Indian method, is found in small patches here & there at or near springs, & in the valleys which are overflowed by rains, & hold moisture during the summer sufficient to perfect the growth of their peculiar corn.

"The same land cannot be cultivated a number of years in succession, so that they change about, allowing the land cultivated one year, to rest several years. I think that the prescribed boundaries, embraces sufficient land for their agricultural & grazing purposes, but certainly not more. I am greatly encouraged by the hope of securing this reservation as it will render the condition of this people more settled & protected.

"In addition to the difficulties that have arisen from want of a reservation with which you are familiar, I may add that the Moquis are constantly annoyed by the encroachments of the Navajos, who frequently take possession of their springs, & even drive their flocks over the growing crops of the Moquis. Indeed their situation has been rendered most trying from this cause, & I have been able to limit the evils only by appealing to the Navajos through their chiefs maintaining the rights of the Moquis. With a reservation I can protect them in their rights & have hopes of advancing them in civilization. Being by nature a quiet and peacable [sic] tribe, they have been too easily imposed upon, & have suffered many losses."

. . . .

"These boundaries are the most simple that can be given to comply with the directions of your telegram, & I believe that such a reservation will meet the requirements of this people, without infringing upon the rights of others, at the same time protecting the rights of the Moquis."

At that time there were about eighteen hundred Hopis, and according to Centerwall's report of July 22, 1942, "a few hundred" Navajos living within the boundaries recommended by Def. 77 Def. 903

Pff. 431 Fleming. In 1945, Dr. Harold S. Colton, then Director, Museum of Northern Arizona, placed the Navajo population on the 1882
Pff. 428, 430 reservation in 1882 as "only 300 . . ." On May 2, 1945, the new Commissioner, William A. Brophy, wrote Senator Wheeler that in 1882 "several thousand Navajos were already using a large part of the area." If Brophy was speaking of just the 1882 reservation he was almost certainly mistaken since, as late as
Def. 205 September 1, 1900, when the first census was taken, the Navajo population on the 1882 reservation was only 1,826 as compared to 1,832 Hopis.

R. 178 As revealed by extensive archeological studies, there were over nine hundred old Indian sites, no longer in use, within what was to become the executive order area but outside of the lands where the Hopi villages and adjacent farm lands were located.
R. 206 Most of these were Navajo sites. Tree ring or dendrochronological studies show that of a total of 125 of these Indian sites within the executive order area for which data was successfully processed, the wood used in the structures was cut during a range of years from 1662 to 1939. A considerable number of
R. 208 these specimens were cut and presumably used in structures prior
R. 221 to 1882. There is no convincing evidence of any mass migration of Navajos either into or out of the executive order area at any time for which the tree ring data were available.

Def. 77 On December 13, 1882, Commissioner Price wrote to the Secretary of the Interior, transmitting a draft of an executive order withdrawing certain lands in the Territory of Arizona from the public domain "for the use and occupancy of the *Moqui* Indians, and such others as the Secretary of the Interior may see fit to settle thereon . . ." (italics indicate underscoring in the original letter). Price requested that the order be laid before the President for his signature.

Def. 78 The Commissioner enclosed with this letter a marked map showing the boundaries of the proposed reservation as they had been suggested in Fleming's letter of December 4, 1882. The material part of this letter reads as follows:

> "In this connection I would respectfully state that the conditions are such that it has been found impossible to extend to these Indians the proper and needful protection to which they are entitled. They have no reservation, but are living in pueblos or villages, cultivating the soil within easy reach.

"They are temperate and industrious, are given to agricultural pursuits which they follow to no inconsiderable extent, and are distinguished for their honesty, for their politeness toward each other, and for their friendship toward the whites; in short they are described as an exceedingly interesting and deserving people.

"They number according to last report 1843 souls. Having no vested title to the lands they occupy, which fact it seems is well understood, they are subject to continual annoyance and imposition, and it is not difficult to see that it is only a question of time, when, if steps are not taken for their protection, they will be driven from their homes, and the lands that have been held and cultivated by them for generations, if not centuries, will be wrested from them, and they left in poverty and without hope.

"Even the Agency itself is unprotected, and the Agent declares himself powerless to do good as matters now are. He finds it impossible to arrest and punish mischiefmakers. They openly and insolently defy his authority, and he is forced to submit. He frankly says: 'If there is no remedy I shall tender my resignation as Agent of the Moquis, believing as I do, that it would not be right for me to remain here simply to draw my salary, with no hope of accomplishing anything.'

"That these people should be separated from the evil example and annoyances of unprincipled whites who appear determined to settle in their midst is a truth that needs no argument, and I know of no way by which the desired end can be reached, other than by withdrawing the lands indicated in the Order herewith presented, from white settlement.

"The estimated area of land cultivated by these Indians is 10,000 acres. Owing to the poor quality of the soil, they seldom plant the same patch two years in succession. Hence they are scattered over a considerable area of country, and the estimated area of their cultivated lands includes all the lands held by them for cultivation."

On December 15, 1882, H. M. Teller, Secretary of the Interior, forwarded Commissioner Price's letter and draft of executive order to President Arthur, stating that he concurred in the PIT. 46

82 Commissioner's recommendations. On the following day the order, set out below, was signed and issued by the President:

> "It is hereby ordered that the tract of country, in the territory of Arizona, lying and being within the following described boundaries, viz: beginning on the one hundred and tenth degree of longitude west from Greenwich, at a point 36° 30′ north, thence due west to the one hundred and eleventh degree of longitude west, thence due south to a point of longitude 35° 30′ north; thence due east to the one hundred and tenth degree of longitude west, thence due north to place of beginning, be and the same is hereby withdrawn from settlement and sale, and set apart for the use and occupancy of the Moqui, and such other Indians as the Secretary of the Interior may see fit to settle thereon."

83 On December 21, 1882, Price sent a telegram to Fleming advising: "President issued order, dated sixteenth, setting apart land for Moquis recommended by you. Take steps at once to
85 remove intruders." This was confirmed by a letter of the same date in which the following additional statements were made (italics indicating underscoring in original):

> "By telegram of this date, you were advised that a reservation has been established, by Order of the President, for the use and occupancy of the *Moquis*.
>
> "I now transmit to you a copy of the order, by which you will see that your recommendations, as contained in letter to this office, dated December 4th (instant), have been followed as regards the boundaries of the same.
>
> "The establishment of the reservation will enable you hereafter to act intelligently and authoritatively in dealing with intruders and mischiefmakers, and as instructed in telegram before mentioned, you will take immediate steps to rid the reservation of all objectionable persons."

4.

From the Executive Order of December 16, 1882, to the Beginning of the First Allotment Period in 1892

Prop. 17, p. 20
51 Before the end of 1882, Hopi Agent Fleming tendered his resignation and it was accepted. As soon as Fleming could wind up his affairs the Hopi Agency at Keams Canyon was closed. Beginning April 30, 1883, the Navajo Agent at Fort Defiance,

New Mexico, was charged with responsibility for the Hopi Indians.

Howard had recommended that one Agent handle both Navajo and Hopi affairs. His proposal, however, was not that the Navajo Agency at Fort Defiance, more than one hundred miles from the nearest Hopi village, be enlarged to include the Hopis, but was that the Hopi Agency at Keams Canyon be enlarged to include the western Navajos. The Hopi Agency was not to be reëstablished until 1899. Def. 22, 39 Def. 101 Plf. Prop. F.F. p. 38

In September, 1884, John H. Bowman, the Navajo Indian Agent, who also had responsibility for the Hopi Indians, reported to the Commissioner of Indian Affairs that the Hopis continued to live in their mesa villages with nearby gardens and orchards. He reported that "the best of good feeling" generally existed between the Navajos and Hopis in that year, noting that members of the two tribes "constantly mingle together at festivals, dances, feasts, etc. . . ." Def. 90 Def. Prop. F.F. 2A

Bowman did, however, call attention to the fact that there were frequent "trifling" quarrels between individual Navajos and Hopis. He stated that this was usually caused by careless herding by the Navajos who allowed their herds to overrun outlying Hopi gardens. Bowman commented: "The Navajos are almost invariably the aggressors."

In January, 1886, Thomas V. Keam, a pioneer of the area, recommended to the Commissioner of Indian Affairs that the Hopis be encouraged to move down off of their mesa tops to the nearby valleys so that they would be closer to their farms and sources of water. To assist in this it was Keam's suggestion that the government supply the Hopis with building materials to enable them to build wood houses in place of their adobe pueblo dwellings. Reporting that Navajos as well as Hopis were occupying the executive order area, Keam recommended that both the Hopis and Navajos be provided with schools. Accompanying Keam's letter was a petition signed by twenty Hopi chiefs and priests asking for help of the kind recommended by Keam. Def. 94-97 Def. 95 Def. 103-104

Keam's recommendation and the accompanying Hopi petition were referred to S. S. Patterson, the Navajo Indian Agent, for a report. He visited the Hopi villages and called a council of Hopi and Navajo Indians. On August 26, 1886, Patterson re- Def. 97

ported that the young Hopis favored moving down to the valleys but that the older ones held "fast to the rockbound dwellings of their fathers." Patterson thought that over a period of years the
Def. 97, 99 Hopis could be encouraged to move down off of the mesas and recommended that any Hopis who were willing to do so be supplied with building materials.

Def. 97, 98, 101 In this letter, and in his regular monthly report dated September 1, 1886, Patterson told of appointing a general council of Indians which was held at Keams Canyon in August. In addition to Hopi representatives from five of the villages, thirty to forty Navajos living in the vicinity of Keams Canyon were in attendance.

At this council meeting Patterson adjusted a few cases of horse stealing and other differences existing between the Hopis and Navajos. He reported, however, that he "found a general good feeling prevailing between the two tribes and a disposition to be friendly in their relations toward each other."

Patterson reported that at this council meeting the Hopis were
Def. 101 favorable to the establishment of a school at Keams Canyon, and promised to send sixty to seventy children from the villages. A few Navajos living in the neighborhood also said they would
Def. 98 send their children to such a school. Patterson expressed the view that "a good and large school for the Moquis childr n can be made a success under proper management. . ." Such a school was opened at Keams Canyon later in 1887, but it is not known how many Hopi children and how many Navajo children, if any, attended at the outset.

Def. 116 In 1888, two Hopi families moved down to the farm lands below the mesas, this representing the first tangible results of the Government's effort to have the Hopis leave their unsanitary mesa villages.

Plf. 61 On September 20, 1888, Inspector T. D. Marcum, who had been investigating the functioning of the Navajo Agency at Fort Defiance, reported that the Hopis were complaining of Navajos "on their reservation," with flocks and herds, destroying Hopi crops and eating their grass. Marcum stated that these complaints were vouched for by white settlers about Keams Canyon. According to the information which Marcum obtained, Navajo Agent Patterson had made several trips to investigate these charges. The

Hopis, however, told Mareum that nothing effective had been done to stop the Navajo encroachment.

On September 26, 1888, Herbert Welsh, Corresponding Secretary of the newly-founded Indian Rights Association, wrote to William F. Vilas, Secretary of the Interior, telling of his immediately preceding visit to five Hopi villages. He reported that at each of these communities he received complaints from the Hopi concerning injuries inflicted upon them as a result of "the continual intrusions and depredations" of the Navajos. The latter, according to these complaints, were stealing Hopi corn, melons and horses. Plf. 62-63, 65

Many Navajos, it was asserted, were occupying 1882 executive order lands "and treat the Moqui lands as though they belonged to them, making use of the Moqui water springs & driving the lawful owners from them." Welsh suggested that in order to make it possible to proceed with the plan to get Hopi children into schools, arrangements be made to have a military officer, accompanied by a "sufficient" force of soldiers, visit the contiguous Navajo reservations. His plan was to have the leader of this force hold council for the purpose of informing the Navajos that their "depredations" must cease and that in the future the wrongdoer may expect punishment for every offense.

Mareum's report and Welsh's letter were turned over to R. V. Belt, Chief, Indian Division, for consideration. Under date of October 10, 1888, which was apparently the day following receipt of the Welsh letter, Belt wrote a memorandum, apparently, addressed to the Secretary of the Interior, summarizing these two writings and expressing approval of Welsh's suggestion concerning military intervention. Belt's memorandum concludes with this statement: "The Moquis reservation was established by Executive Order of December 16, 1882, for the Moqui and such other Indians as the Secretary of the Interior may see fit to settle thereon. It comprises no lands set apart for the Navajoes and no Navajoes have been settled thereon by the Department." Plf. 64 Def. Obj. p. 19 Def. 64

Upon receipt of the Belt memorandum written earlier the same day, Secretary Vilas wrote to the Secretary of War, transmitting a copy of the Welsh letter and also referring to the Mareum report. Vilas expressed approval of Welsh's suggestion for military intervention and requested the Secretary of War to give the necessary orders to carry it into effect. Plf. 65, 66

Vilas specifically requested that the company of troops to be dispatched to the area be instructed "to remove all Navajo Indians found trespassing with their herds and flocks on the Moqui reservation and to notify them that their depredations must cease and that they must keep within their own reservation." It will be noted that in requesting removal of all Navajos found trespassing with their herds and flocks, the Secretary of the Interior proposed more drastic action than had been recommended by Welsh or Belt.

Plf. 65

In this communication, Secretary Vilas made the identical statement that Belt had made, to the effect that the reservation in question comprises no land set apart for the Navajos, and no Navajos had been settled thereon. Vilas had then been Secretary about nine months.

Def. Obj. p. 19

The result was that, on November 15, 1888, Col. E. A. Carr, commanding officer at Fort Wingate, New Mexico, received orders from the Adjutant General, Department of Arizona. These orders were to send an expedition to the reservation area with instructions to prevent Navajo trespassing and keep them within their own reservation. Col. Carr telegraphed the Adjutant General that, in compliance with these orders, Capt. Com. M. Wallace and fifty men, infantry, cavalry and scouts, would be sent on the expedition.

Plf. 67
Def. 110

Plf. 70, 72, 69, 76

Col. Carr, however, also reported to the Adjutant General in this telegram that his Navajo interpreter, Henry Dodge, commonly called "Chee," had told him that there were five or six hundred Navajos comprising one hundred or more families, living on the December 16, 1882 reservation. According to Chee, the Hopis did not wish the Navajos removed summarily and would not benefit if this were done during the winter. Chee also told Col. Carr that it would be a great hardship on these Navajo families to eject them from their homes at that time of year.

Plf. 69-76

Col. Carr called the Adjutant General's attention to the fact that Welsh had not suggested removal of Navajos but had proposed only that a council be held and that the Navajos be warned that their depredations must cease. Col. Carr suggested that it would be more just, humane and polite "to hasten slowly and at least hear the Navajos before subjecting them to eviction amid the rigors of winter." He asked whether, in the light of this new information, his instructions would be modified.

On the following day, the headquarters department of Arizona advised Col. Carr that he was to interpret his previous instructions "in accordance with the letter of Mr. Welsh upon which they were based." Accordingly, Col. Carr was told that the actual removal of any Navajos who have had homes for a long time upon the reservation in question "will be deferred until Spring at least."

Making clear that this limitation applied only as to Navajo use and occupancy which did not interfere with the Hopis, Carr was further instructed: "Should any Navajos be found trespassing, depredating, or in any way doing injury to the persons or property of the Moquis, they should be removed to the Navajo Reservation and required to remain there." A copy of these instructions reached the Commissioner of Indian Affairs early in December, 1888. He instructed his subordinates to "let this rest and see what the military do." Plf. 70 Def. 113

Col. Carr had planned to have the expedition consisting of Capt. Wallace and forty-eight officers and men, together with ten mounted and armed Indian scouts, leave Fort Wingate, New Mexico on November 17, 1888, and proceed to the border line between the Navajo reservation and the December 16, 1882 reservation. On November 17th, however, he received instructions that "there is no necessity for haste in making the movement," and that the military force should be reduced to thirty men, to be supplied with wagon transportation. Plf. 72 Plf. 73

The record does not indicate when the expedition got under way. However, by December 5, 1888, Capt. Wallace had progressed sufficiently to send back a report of his operations and observations upon the December 16, 1882 reservation. According to later reports, Capt. Wallace required the Navajos occupying certain springs to move away, instructing them not to live there or drive their herds in that vicinity. Plf. 75 Plf. 77

After Capt. Wallace left, the Navajos returned to the area from which he had ejected them, and other Navajos moved within eight miles of the Hopis. Col. Carr learning of the latter incident, wrote to Navajo Chief Sam Begody asking him to notify these Navajos that they had no right to move nearer to the Hopi villages. Col. Carr told Chief Begody that these Navajos must move back and stay "at least twelve miles away from the Moquis and please see that they do it." Col. Carr concluded: "I Plf. 77 Plf. 76

had great trouble to save the Navajoes from being moved, and I hope that they will not take advantage of any kindness to continue to impose on the Moquis."

Def. 116 By 1889, the Hopi population was about 2,100, and there were more children among them in proportion to adults than were then generally found among Indians. In that year several more Hopi families moved down from the mesas to the valleys below, following the example of two families which had pioneered in Def. 117 this move the previous year. The school at Keams Canyon then had from forty to forty-five Hopi children in attendance.

Def. 114 In July, 1889, Keam wrote to T. J. Morgan, Commissioner of Indian Affairs, reporting that Navajo Indians living on the December 16, 1882 reservation, often drove their herds to watering places within five or six miles of the Hopi villages, greatly to the disadvantage and annoyance of the Hopis. Keam suggested that the Navajo Agent, accompanied by an army officer and a small force, take some representative Hopis and Navajos and show them "some natural boundaries, at a reasonable distance from the villages, say twelve miles, over which the Navajo must not drive his herds or water or graze."

The Commissioner referred this letter to R. V. Belt, Chief of the Indian Division, with the comment: "This suggestion of Mr. Keam seems reasonable. What can I do to carry it out?" The record does not indicate what response Belt made or that anything was done to effectuate Keam's proposal.

Def. 126-127 In 1890 a group of representative Hopis, headed by Chief Pif. 82 La-lo-lami, were taken on a Government-sponsored trip to Washington, D. C. to confer with administrative officials, and inspect Pif. 81 schools and agricultural activities en route. This was the first time that any Hopi had been east of Albuquerque, New Mexico.

Def. 124 From the beginning to the end of 1890 complaints concerning Navajo depredations upon the Hopis continued, although there was also one report that friction between the two tribes was decreasing. It was reported in January of that year that the Pif. 81-82 largest Hopi village, Oraibi, had sent no children to the school at Keams Canyon because of the Government's failure to protect the Hopis from the Navajos.

Pif. 84 In February, 1890, the Commissioner of Indian Affairs, being informed of complaints by white settlers against the Navajos, instructed the Navajo Agent at Gallup, New Mexico, to immedi-

ately take energetic and proper steps, without endangering the peace, "to keep the Indians—with the exception of those who have settled upon lands outside of their reservation for the purpose of taking homesteads—within the limits of their reservation, and to return roving Indians to the reservation." It is not known what steps the Navajo Agent took in response to this instruction.

In the Agent's annual report, dated August 22, 1890, he stated that he had frequently warned the Navajos "not to approach with their herds within certain specified limits, which would give the Moqui ample room for grazing. . ." Def. 124

In October, 1890, Ralph P. Collins, superintendent of the Hopi school at Keams Canyon, reported that there were then only twelve children in school. He had been told by Hopi chiefs that they would not send more children so long as the Navajos' depredations were allowed to continue. In this report Collins told of one incident in which Navajos had attacked Hopis in a Hopi corn field and had beat them unmercifully, leaving one nearly dead. Collins stated that he could see no practical solution but to have enough troops to arrest "these lawless Navajoes and take them to prison, put the others off the Moqui reservation and keep them off and then at the same time force the Moqui to fill their school at once. . . ." Def. 129 Def. 130

Apparently on the basis of Collins' report, Commissioner T. J. Morgan wrote to R. V. Belt, under date of November 17, 1890, summarized the Hopi complaints and stated that "Some vigorous steps should be taken to prevent this state of things. . . ." Morgan also commented that the Hopi reservation is much larger than they use or will ever need, and it would be a great benefit to them if a portion of it could be disposed of and its equivalent were given to them in improvements. Plf. 89

During November, 1890, Superintendent Collins, with two others, went to Oraibi and arrested two Hopis who were threatening to kill others who sent their children to the Hopi school. This had the effect of breaking Hopi oppositions, and by late November Collins was able to respond that fifty-nine Hopi children were attending the school. Collins also reported that several more Hopi families had moved down from the mesas. He told of continued Navajo trespassing, however, and said the Navajo herds had eaten the last vestige of Hopi corn stalks and most of their winter grass. Collins recommended that troops be sent at once to drive the Navajo herds from among the Hopis. Plf. 90

Def. 138 Collins' November recommendation went unheeded. On December
Plf. 91 16, 1890, Special Agent George W. Parker sent a telegram to the Commissioner stating that a company of soldiers should be sent at once to remove trespassing Navajos from among the
Plf. 92 Hopis, and to arrest rebellious Oraibi Hopis. Two days later Parker wrote to the Commissioner reporting further Navajo depredations involving the theft of eleven horses.

Plf. 95 Upon receiving Parker's telegram, the Commissioner telegraphed General McCook at Los Angeles to send troops immediately to Keams Canyon. On December 17, 1890, such an expedition was sent on its way. On December 18, 1890, the Commissioner made a full report of developments to the Secretary of the Interior, stating that "It is very desirable that the Navajos should be forced to retire from the Moqui reservation. . . ."

Commissioner Morgan reported in this letter that the Oraibi Hopis had refused to permit a census of their village because "white people were all liars and coyotes and that they would have nothing to do with them." It was the Commissioner's idea
Plf. 94 that the troops would not only protect the Hopis from the Navajos, but their appearance would encourage the Hopis to send their children to the school.

On December 22, 1890, Commissioner Morgan sent instructions to Special Agent Parker to cooperate with the troops and Superintendent Collins "in such way as may be proper to eject the Navajos from the Moqui country to protect the Moquis from
Def. 139 the former. . ." Parker was directed "to exercise proper care and tact not to inflame the minds of the Navajos and endanger an outbreak with them. . . ." But Parker was told to assure the Moquis "that this office is determined to protect them fully from the wrongs of the Navajos and to properly protect said school."

The troops reached Keams Canyon on Christmas Eve, 1890. It was then learned that the Hopis of Oraibi village had mani-
Def. 140 fested no intention of sending children to the school and had actually imprisoned their chief, La-lo-lami, who had been friendly
Def. 142 to the school. Accordingly, Lt. Charles H. Grierson, in charge of the troops, marched them to Oraibi and succeeded in getting
Def. 142 these Hopis to agree to send their children to the school, La-lo-lami having already been released.

A census was also taken at that time, 750 men, women and
Def. 141 children being counted. Lt. Grierson reported on December 28,

1890, that 102 Hopi children were then in the school, forty-two of these from Oraibi.

The officer reported that the Hopis requested protection from the Navajos and commented that the latter have "undoubtedly annoyed the Moquis in many ways, especially during the planting season when the water holes and springs are nearly dry, by their numerous herds of sheep, and have committed depredations to a greater or less degree upon them always." Lt. Grierson stated that he saw no Navajo herds in the vicinity of the Hopi villages.

Lt. Grierson apparently did not have instructions to carry out the Commissioner's plan to have Navajos ejected from the Hopi country. But, on December 31, 1890, Superintendent Collins sent Plf. 100
a telegram to General McCook, in Los Angeles, stating that Lt. Grierson, having "completed his instructions" concerning Oraibi school children ". . . should be instructed to remove intruding Navajos from among the Moquis before leaving."

On the same day, and probably without having seen Collins' telegram, Capt. H. K. Bailey at Los Angeles, wrote to Lt. Grier- Plf. 102
son, calling attention to complaints concerning the Navajos. Stating that ". . . this business, as you are aware, belongs more particularly to the Interior Department," the lieutenant was nevertheless directed to hold interviews with the Navajos who are reported as trespassers upon the Hopi lands and explain to them that they should cease molesting the Hopis.

Lt. Grierson was told that the Navajos and Hopis have intermarried and there is continuous trade between them, and he should therefore be very "guarded" in his action, especially towards the Navajos, "and under no circumstances, if it can be avoided, will any harsh measures be taken towards them at this time." Capt. Bailey further stated that until the boundary line between the Navajo and Hopi reservations is distinctly marked, "only persuasive measures will be used towards the Navajos in this regard."

Thus, as 1890 came to a close, the wish of the Washington office that Navajos who were interfering with the Hopis be removed from the 1882 reservation, had not been fulfilled. But, at least the presence of the troops had brought Navajo depredations to a halt and had succeeded in getting full attendance at the Hopi school.

As 1891 opened, Lt. Grierson was still at Keams Canyon with his detachment. Having received the lieutenant's report of De-
Plf. 104 cember 28, 1890, Brigadier General McCook, on January 3, 1891, submitted recommendations to the Adjutant General of the Army.

It was his view that the line of demarcation between the Navajo and Hopi reservations be distinctly marked by indestructible monuments and that the water in the neighborhood of the line and lying east thereof be reserved for the Navajos, and that to the west for the Hopis. General McCook stated that, until this is done it would not be wise to use force to prevent the Navajos from grazing near the Hopi reservation.

Special Agent Parker apparently understood the Commissioner's instructions of December 22, 1890, in which he was ordered to cooperate with the troops in ejecting the Navajos from "the moqui country," as requiring that the Navajos be kept away from the Hopis but not necessarily that they be ejected from the reservation.

Early in January, 1891, he and Agent Shipley, Supt. Collins, Lts. Grierson and Rowell, Keam and Parker decided that "the limits of land reserved for use of the Moquis from which the Navajoes shall not be allowed to enter with their herds, shall embrace a radius of sixteen (16) miles from the village of Mishognivi [sic] (on Second Mesa)." They further decided that they would construct mounds or monuments at different points along this line, and that Navajos would not be permitted to maintain herds within this area.

In reporting this development to the Commissioner on January 7, 1891, Parker stated that the Hopis were well satisfied "with the boundaries we established," and had appointed representatives to help erect the line mounds. Parker reported that the Navajos were also willing to comply with the new plan. In a
Def. 150 report dated January 8, 1891, confirming this development, Lt. Grierson stated that there were very few Navajos who had hogans and were living within the lines to be marked.

The Commissioner of Indian Affairs was advised of this plan to mark a "boundary" line, having a sixteen-mile radius, around the Hopi village of Mishongnovi, being told that both the Hopis
Plf. 139 and Navajos were agreeable thereto. He apparently acquiesced in the arrangement, although it was never expressly confirmed by

the Washington office. This 1891 line was thereafter referred to as the "Parker-Keam" line.

Under date of January 30, 1891, the Commissioner reported to the Secretary of the Interior that the affairs between the Hopis and Navajos in the vicinity of Keams Canyon "have been brought to a satisfactory conclusion." The Commissioner recommended, however, that the troops remain temporarily at Keams Canyon as an influence upon the Hopis to accede to the Commissioner's plan to place Hopi children in the school at Santa Fe. This was apparently arranged and the troops remained until the middle of March, 1891. Pif. 113 Def. 154 Def. 155

By March 18, 1891, Special Agent Parker reported to the Commissioner that the Navajos were obeying the restrictions involving the Parker-Keam line delineated earlier in the year, and that Hopi reports of Navajo horse stealing were false. Parker stated that about 150 deserted Navajo hogans were found within the so-called circular boundary. Def. 155

According to Parker, the Hopi school at Keams Canyon was also flourishing and the Hopi children had proved to be adept students. In August, 1891, Parker reported that a considerable movement of the Hopis from the mesas to the valleys was in progress and that more than fifty houses were under construction. Def. 159

5.

From the First Allotment Period in 1892 to the End of the Second Allotment Period in 1911

Early in 1892, the Office of Indian Affairs put into operation a plan to allot lands to individual Indians on the 1882 reservation, pursuant to the Act of February 8, 1887, 24 Stat. 388, as amended by the Act of February 28, 1891, 26 Stat. 794. John S. Mayhugh, Special Alloting Agent, was directed to proceed to Keams Canyon for that purpose. Mayhugh was given specific instructions concerning this work, including the following: Pif. 116 Pif. 117

> "No person should be allowed an allottment [sic] on said reservation unless the father or mother is or was a recognized Moqui Indian. No allottments [sic] will be made to Indians other than Moquis, as just set forth, except by express authority of this office." Pif. 118

Almost immediately, Mayhugh ran into difficulties in carrying out this allotment program. He discovered that most of the Hopis desired to continue living in their villages, that they were satisfied with the existing communal method of working the land, that individual Hopi "families" or "people," such as the Snakes, Eagles, Antelopes, Corn and Tobacco families or peoples desired to have all of their respective lands contiguous and undivided.

Pff. 120, 122
Def. 165

Mayhugh nevertheless persisted in his work after first taking a careful census which produced a population figure of 1,976 Hopi men, women and children. In August, 1892, he reported that the 1891 Parker-Keam boundary plan was still working well and that the Hopis had been thereby encouraged to put more ground under cultivation. He also stated that twenty-two Hopi houses had been constructed in the valleys and that one hundred more were being erected.

Def. 164
Def. 169
Def. 170

In February, 1893, Mayhugh urged the necessity of additional surveys. He also recounted the difficulties he was having with the faction among the Oraibi Hopis known as the "hostiles," led by Hab-be-mor. This group of three hundred Hopis had consistently declined to take their land in severalty, preferring to hold their land in common and to be "let alone" by the white man.

Def. 173
Def. 172
Def. 173

A few days later Mayhugh reported to the Commissioner, for examination and approval, Mayhugh's action in making an allotment to a Navajo Indian, Navajo wife, and one child born on the reservation. This was done because the Navajo man had lived on the reservation since boyhood and claimed that he had become a Hopi. At the same time Mayhugh had refused to give allotments to six children of the Navajo woman, but not of the Navajo man, who had been born off of the reservation. Insofar as the record indicates, the Commissioner made no response to this report.

Def. 175

In the summer of 1893, Mayhugh reported to the Commissioner that he had allotted lands at Jeddito Springs, just outside the Parker-Keam line, to a Hopi at the latter's request, notwithstanding the fact that he found ten Navajo families occupying the land. Mayhugh ordered the Navajos to leave but they failed to do so.

Def. Prop. F.F. p. 19
Def. 177

The Commissioner immediately advised Mayhugh that "it is not deemed advisable to remove them [the ten Navajo families] at this time. The Moquis desiring said lands should make other selections." This is the first instance in which the Commissioner

had ordered that Navajos be left in undisturbed possession of lands, within the reservation area, sought to be used and occupied by Hopis.

Another incident reported by Mayhugh in the summer of 1893 involved the request of two Navajos that they be allotted specific lands. Being unable to determine whether the land was on the Hopi or Navajo reservation, Mayhugh denied the request, thus again indicating that 1882 reservation lands would not be allotted to Navajos. Def. 130

Navajo encroachments upon the Hopis apparently resumed in 1893. Reporting to the Secretary of the Interior on September 16, 1893, Commissioner D. M. Browning stated that the Hopis were still "exercised over the intrusion of some of their neighbors, the Navajoes, a number of whom have been for some years located upon certain tracts desired by the Moquis. Measures looking to their removal are now being pushed." Def. 179

Two months later, on November 23, 1893, C. W. Goodman, the then Hopi school superintendent at Keams Canyon, relayed to Lt. Plummer at Fort Defiance, a report from Tom Polacca, a Hopi, that some Navajos had settled down on his range and by his springs, with stock. Goodman added: ". . . A great many Navajoes seem to be making themselves very much at home on the Moqui reservation. I hope that something can be done speedily to relieve the Moquis from their fear of intruding Navajoes. . . ." Plf. 137

By October 23, 1893, Mayhugh was able to report to the Commissioner that he had made 1,322 allotments to Hopi Indians, and that it would require about six weeks more to complete the program. Def. 179 Def. 182

In the fall of 1893, one W. Hallett Phillips wrote to the Commissioner complaining, among other things, that the allotment program was endangering the Hopis' title in the lands they occupied. Replying under date of November 11, 1893, the Commissioner reviewed the events leading up to the setting aside of the 1882 reservation and the later commencement of the allotment program. He then stated: ". . . No apprehension need be felt as to the security of their [Hopis] present title to their lands or that the allotment of a portion of them in severalty will have any tendency to weaken that title." Def. 180 Def. 180-183 Def. 183

On February 19, 1894, Mayhugh made his final report on the Hopi allotment project. A total of 1,634 allotments had been Def. 185 Def. 189

made. A substantial number of Hopis at Oraibi, however (three hundred ("hostiles" and ninety-nine "friendlies") had not received allotments. Mayhugh reviewed the difficulties which he had encountered and expressed the view that, because of their lack of knowledge, the Hopis did not comprehend their rights, and benefits gained, under the allotment act. He also expressed concern that if the Hopis became citizens on approval of the allotDef. 191 ments their personal property would be endangered because of local tax levies. Mayhugh reported that the Navajos were not enDef. 190 croaching upon the Hopis as much as theretofore, but still did so occasionally.

While the matter of approving the Mayhugh allotments was Plf. 139 pending in Washington, Mayhugh told Lt. Plummer, then the Def. 197 acting Indian Agent at Fort Defiance, that he considered it a mistake to allot lands to the Hopis in severalty. On April 10, Plf. 139 1894, Lt. Plummer advised the Commissioner of this conversation and added his own view that if the allotments were confirmed "confusion and trouble will ensue." The difficulty was that Def. 196 the Hopis preferred to hold their lands in common rather than in severalty, and that it is necessary to shift the planting grounds almost yearly. Enclosed with Lt. Plummer's report was a letter by Thomas V. Keam and a petition signed by 123 chiefs Plf. 141 and headmen of the Hopi Indian Tribe asking that they be permitted to hold their lands in common according to their accustomed system. They wanted "neither measuring nor individual papers. . . ." In another enclosed petition, signed by Brigadier General McCook and his officers, similar views were expressed.

On May 30, 1894, Lt. Plummer gave written notice "(t)o whom it may concern," that the spring known as "Comah" Spring, Def. Ex. 562 "where the old (Navajo) Indian Chief Comah lived," is situated within the 1882 reservation, and all persons were

> ". . . warned against trespassing on this land or attempting to deprive Indians of the use of the water or of the land thereabouts."

This notice was apparently understood by the Navajos living in that neighborhood as an official designation of this particular area for the exclusive use of Navajos.

Def. 196-197 Acting Indian Agent Plummer, in his annual report of August 17, 1894, renewed the recommendation that, for reasons already cited, the Hopi allotments be not approved. Plummer

reported that there had been a drop in Hopi school attendance at the Keams Canyon boarding school, but that day schools at Oraibi and at the first mesa were being successfully operated. About fifteen Navajo children were being permitted to attend the Keams Canyon school, this being the first recorded instance in which Navajos on the 1882 reservation were given such Government help. Def. 196

Plummer reported that the project to get Hopis down off of the mesas was not as successful as desired and that many of the houses which they had built in the valleys were unoccupied the greater part of the year. Apparently on the basis of the adverse recommendations which had been received, the Mayhugh allotments were not approved and the first allotment project thus came to an unsuccessful end in 1894. Plf. Prop. F.F. p. 37

After discontinuance of the first Hopi allotment project at the end of 1894, nearly five years went by before further events of significance concerning the Hopi-Navajo controversy occurred. On July 18, 1899, Charles E. Burton, the newly-appointed superintendent of schools at Keams Canyon, wrote to the Commissioner complaining of Navajo encroachments and thievery.

He stated that the Navajos had taken possession of the best springs and valleys, forcing the Hopis to drive their stock long distances to less desirable grass and water. Hopi cattle engaged in these treks occasionally damaged or destroyed Navajo crops, and the Navajos retaliated by killing or stealing strays. Def. 198

Burton stated that he saw no reason why "this trespassing by these Navajos should continue any longer," and recommended that immediate steps be taken "to return the Navajos to their reservation." Burton also complained of the distance between the Hopi village and the agency at Fort Defiance.

When Burton's letter reached the Office of Indian Affairs a notation was added suggesting that the letter be held until Burton became better acquainted with conditions, "as the Navajoes have always trespassed upon the Moqui resn. . . ." Later in 1899, a Hopi Agency was reëstablished at Keams Canyon with Burton as Acting Agent. Def. 199 Plf. Prop. F.F. p. 38

In 1900, average attendance at the Keams Canyon boarding school was 123, representing an increase of more than fifty percent over the preceding year. In addition, three Hopi day schools were operated, with a combined average attendance of Def. 206 Def. 201 Def. 209

Def. 204
Def. 209

166. A boarding school for Navajo children, with an average attendance of thirty-five, was operated at Blue Canyon, which is in the northwest part of the 1882 reservation, but near the westerly boundary line.

Def. 204

Burton, the school superintendent and Acting Indian Agent at Keams Canyon, in his annual report of September 1, 1900, again reported that the Navajos had been allowed to encroach upon "the Hopi Reservation" for years, taking possession of the best watering places, best farming and best pasture land.

Def. 205

A census completed in June, 1900, showed that there were then 1,832 Hopis and 1,826 Navajos on the 1882 reservation.

Def. 207

In an effort to minimize Navajo encroachments in the 1882 reservation area, Burton recommended that the two traders then doing business on that reservation be restricted in their trade to Hopis only. The Commissioner replied, under date of September 22, 1900, that it was not practical or fair to the traders to ask them to keep the "trespassing" Navajos out by refusing to trade with them, "just because of tribal differences in the buyers. . . ."

Def. 207

The Commissioner also expressed the view, however, that he very much wished "that some means could be devised to protect the Hopi Indians from the oppression of the neighboring Navahos." On October 5, 1900, Burton responded to this communication in very vigorous terms, asking: "What right do these trespassing Navahos have on the Hopi reservation that they may be allowed to intimidate the Hopis so that they will go nowhere to trade?"

Def. 208
Pif. 152

At the same time Burton advanced the alternative recommendation that an order be issued requiring every Navajo on the 1882 reservation who wished to trade at the Indian Posts to register, as an evidence of good faith in their conduct towards the Hopis. Two and a half months later Burton received his reply from the then Commissioner, W. A. Jensen. Burton was advised that it was not practicable to adopt his recommendations, but that it was hoped that the licensing of two more stores would "do much to remedy matters."

A year and a half later, on July 22, 1902, Milton J. Needham, Superintendent of the Western Navajo School at Blue Canyon, submitted an annual report concerning the operation of this

Navajo industrial school. As before noted, Blue Canyon is located in the northwest part of the 1882 reservation.

Needham stated in his report that the "Western Navaho Reservation" is made up of the western part "of the Navaho Reservation (Executive Order of 1884) *and a small portion off of the northwest corner of the Moqui Reservation* and the lands embraced in the extension by Executive Order of January 8, 1900, and also Executive Order of November, 1901." (Emphasis supplied.) Def. 212

Another five years were to pass before there were further events of significance. On September 13, 1907, C. F. Larrabee, the then acting Commissioner wrote to the Secretary of the Interior, urging that a new Hopi allotment project be undertaken pursuant to the Act of March 1, 1907, 34 Stat. 1015, 1018. Def. 215

The 1907 Act authorized the Secretary to allot lands in severalty "to the Indians of the Moqui Reservation in Arizona," subject to the provisions of the Allotment Act of February 8, 1887, 24 Stat. 388. On September 16, 1907, the Secretary authorized the undertaking and referred the matter to the Commissioner of the General Land Office, to make the necessary subdivisional survey. Plf. 156

On January 23, 1908, the President appointed Matthew W. Murphy Special Allotting Agent to make allotments to the Hopis. The Commissioner instructed Murphy that he should first allot the Hopis on lands which they were then occupying or that were not in the possession of the Navajos. But the Commissioner added: "However, if there is not sufficient land for the Moquis, it is the intention of the Office to remove the Navajos from the Moqui Reservation." Referring to these last quoted instructions, Murphy wrote to the Commissioner, on July 10, 1908, that it would be necessary to remove certain Navajos from the vicinity of the Moqui villages, if not from the Moqui reservation. Plf. 158

Murphy added: "I find practically all the springs in the possession of Navajos, and I find Navajos living within three miles of some of the Moqui villages." Murphy requeste authority to remove the Navajos himself, or that a special agent be sent to effect their removal before the allotments were made.

The then Commissioner, F. E. Leupp, replied under date of August 26, 1908, stating that before the matter of the removal of Navajos was finally determined, some plan should be evolved "which will effect their removal with the least possible friction." Plf. 160 Def. 222

Murphy was requested to submit suggestions as to how this might be done. Before receiving the Commissioner's letter, Murphy wrote again under date of August 17, 1908. He stated that in making Def. 218-219 allotments to the Indians in six Hopi villages, it would be necessary to remove only two or three Navajo families, although there was Navajo grazing which would presumably have to be stopped.

On September 5, 1908, Murphy replied to the Commissioner's request for suggestions. It was his idea that the Navajos be permitted to select allotments among the Hopis if this was agreeable to both tribes, otherwise that Navajos make their selections "outside of the lands to be allotted to Hopis." If the Navajos would not agree to either of these courses, Murphy recommended that they "be forcibly returned to the locality from which they came."

On February 25, 1909, the then acting Commissioner, R. G. Def. 222 Valentine, gave Murphy new instructions. The most significant of these was that an allotment "should be made to each Indian on the reservation entitled, irrespective of the fact of whether such Indian is a Moqui or a Navajo."

Def. 223 In explanation of this instruction, the Commissioner referred to the Executive Order of December 16, 1882, quoting the critical language, and the Act of March 1, 1907, 34 Stat. 1021, and stated:

Def. 223 "... There is ample authority, therefore, for making allotments in the areas recommended by you and as specified herein. There is ample authority, also, for making allotments in the Moqui reservation to such Navajo Indians as may be located therein and who intend to remain in the reservation. If the Navajos decline to accept allotments in the Moqui reservation of the areas specified herein they can be removed from the reservation, but, in the interests of all persons concerned the Office trusts that they will agree to accept allotments there."

In clarification of this instruction given on November 29, 1910, Murphy was advised that: (1) any Navajos who met the conditions imposed by those instructions would be entitled to allotPlf. 171 ments, whether or not they were in contact with the Hopis, and (2) each Navajo must be required to choose whether to take his allotment from the Hopi or Navajo reservation, and may not take part from one reservation and part from the other.

Approximately three hundred Navajos residing on the 1882 reservation indicated a willingness to accept allotments, and received allotments subject to approval. Plf. 197

It was also in 1910 that the same difficulties began to develop which brought the first allotment project to a halt, and some new allotment problems, related mainly to the friction between Hopis and Navajos began to appear. Plf. 166, 167-168, 173, 174 Def. 230

One of the allotment problems which developed in 1910 appears to have special significance. A party of about fifty Oraibi Hopis wished to take allotments some fifteen miles from their village, and establish another village. This would require the removal of three Navajo families at Little Burro Spring. S. M. Brosius, Agent of the Indian Rights Association, protested the displacement of these Navajo families. Plf. 167 Plf. 173 Plf. 168 Plf. 177

In a letter to the Commissioner, dated January 24, 1911, commenting on this protest, Hopi Superintendent A. L. Lawshe said, among other things: "As I understand the matter the two tribes now have substantially equal rights, which should be preserved."

Writing to Brosius after receiving Lawshe's report, C. F. Hauke, the Second Assistant Commissioner, stated that since the three Navajo families had occupied and used the lands in the vicinity of the spring in question for many years, "any rights they may have acquired thereby will be respected." The Second Assistant Commissioner then stated: "The Superintendent's [Lawshe's] report indicates that he appreciates the fact that the Navajos and Moquis have equal rights on the reservation, and that he will endeavor to exercise justice and impartiality in dealing with the two tribes." Plf. 178 Def. 232

On January 6, 1911, Special Allotting Agent Murphy was directed to suspend further field operations pending a determination of whether the allotment work should be discontinued. On February 14, 1911, Superintendent Lawshe, writing to the Commissioner from Keams Canyon, recommended that the allotment program be abandoned. Def. 235

He gave four reasons, namely: (1) inadequate water supply, making it impracticable for Indians to live on allotments, (2) sandy soil drifts with the wind so that land which is possible of cultivation one year may be too arid the next year, (3) allotments are not needed to keep white settlers out because "no white man would ever undertake to settle on any of the land Def. 233-234

available for allotment," (4) allotments are not suitable for a tribe such as the Hopis which live under a communal system, and if allotments in severalty were imposed, thrifty Indians would prosper and others would become poverty stricken and public charges.

f. 225-226 Lawshe's recommendations were accepted and, on March 31, 1911, Murphy was directed to discontinue allotment work. No allotments under this second allotment program were approved.

6.

From the End of the Second Allotment Period, in 1911, to the Act of May 25, 1918

In his letter of February 14, 1911, recommending discontinuance of the second allotment project, Superintendent Lawshe had observed that the only valid argument which could be made in favor of allotments "is that it would put a stop to the gradual encroachment of the Navajos upon the Hopi people." In Lawshe's view, a better way to solve that problem "would be to divide the Reservation itself, setting apart a definite portion of the land for the Hopis alone, assigning the rest to the Navajos."

On March 25, 1911, Lawshe wrote to the Commissioner, calling attention to uncertainties as to the boundaries of the "Moqui Reservation." He stated that several delegations of Navajo In-
f. 182 dians had lately visited him at the agency to make inquiries as to the location of the boundary.

Responsive to this report the Commissioner of Indian Affairs wrote to the Commissioner of the General Land Office, under date
f. 184 of April 17, 1911, to request that before the surveyors leave the area because of the discontinuance of the allotment work, they survey and mark out the boundary lines of the "Moqui Reservation." Commissioner Valentine wrote that this work should be done "so as to be able to settle disputes between the Moqui Indians and the Navajo Indians as to the lands."

Just as the continuance of the second Hopi allotment project brought to light perplexing problems, so did its discontinuance.
f. 186 On November 14, 1911, William E. Freeland, the Hopi school
f. 190 superintendent at Oraibi, wrote to Leo Crane, the then superintendent at Keams Canyon, calling attention to the fact that a number of Hopis of that village, upon the urging of Special

Allotting Agent Murphy, had sought to reestablish themselves below Burro Springs, about fifteen miles southwest of Oraibi. Def. Ex. 451A

Murphy had given them to understand that the new locations would be allotted to them, and their old lands which they had tilled for generations were given to other Indians. But when these Oraibis tried to build their new homes Navajos who were already there objected and threatened violence. Then the Government discontinued the allotment program and the Oraibis were not awarded the promised lands. On November 20, 1911, Crane wrote to the Commissioner for instructions. As one possible solution he recommended a "marked and definite division of the Moqui Reservation." Pif. 186 Pif. 192

Crane received no reply from the Washington office until February 10, 1912. In a letter bearing that date, Second Assistant Commissioner C. F. Hauke stated that the problem had been under consideration but that more information was needed. He requested that Crane, working with Freeland, submit additional data and detailed recommendations. Hauke told Crane that the Oraibi Hopis in question should be told that Washington "will do its utmost to see to it that they will be allowed to occupy and cultivate the lands assigned to them." Pif. 194-195

Crane was further advised, however, that the Indians should not be told anything "in regard to the proposal to divide the reservation." Hauke also wrote that, in considering this proposal, "due weight should be given to the fact that the reservation was created primarily for the Moqui (Hopi) Indians, though it was also provided that the Secretary of the Interior might in his discretion settle other Indians thereon." Pif. 194-195

In his annual report for 1912, Leo Crane, who had served as Superintendent of the Hopi schools and agency for one year, stated that the Hopi people were surrounded by Navajos, and that "these Navajos were permitted to remain on the reservation, having a right of occupancy when the reservation was created by Executive Order of December 16, 1882." This is the first instance in which any Government official expressed the view that Navajos living in the reservation area at the time the 1882 executive order was issued, thereby gained a right of occupancy. Def. 243

In his 1912 report Crane also noted that the cattle and sheep of such tribes, using common grazing lands, were constantly damaging the cultivated fields of the other tribe. Complaints

resulted which Crane found most perplexing to solve. He therefore renewed a recommendation which he had previously made, and which Superintendent Lawshe before him had made, that the reservation be divided so that there would be a separation of the Indians' interests.

It was apparent that the old Parker-Keam circle boundary of thirty years earlier had long been disregarded. Crane might not even have been aware of this earlier attempt to divide the reservation. He stated, in connection with his renewed recommendation, that "no separation can be made to conserve to the Hopis sufficient grazing lands and water without the ejectment of Navajos from occupancy rights that have been assumed for years and in some measure recognized by the Department."

Nothing came of Crane's latest suggestion that the 1882 reservation be divided. Two years later work was undertaken by the Land Division, to develop additional springs for the Hopis. On May 26, 1914, H. F. Robinson, Superintendent of Irrigation for the Land Division, while engaged in this work, wrote a lengthy letter to the Commissioner of Indian Affairs concerning Navajo encroachments upon the Hopis.

He stated that with the development of wells and springs and the natural increase of their flocks, and because of the worn-out condition of the grazing near their mesas, the Hopis now desired to move out further with their livestock. But they found that the "thrifty and pushing Navajos have preempted their land and water and by gradual but continued encroachments has [sic] hemmed them in. . ."

In his letter Robinson stated that Navajos were occupying some three hundred choice allotment sites which had been granted to them on the reservation, but which had never been approved. Characterizing the Hopis as peaceful and submissive, Robinson reported that they were discouraged "and feel that they are being crowded to the wall. . . ." Robinson conceded that there were many things in connection with the administration of the affairs of these Indians which he was not acquainted with and that he had no practical remedy to offer.

As one possible solution, however, Robinson suggested that available land and springs to the south be acquired for the Navajos and that they be moved off of the 1882 reservation. The Chief of the Land Division, upon receiving a copy of Robinson's

letter, wrote a memorandum in which he stated that "This same condition of affairs has been reported to the Office several times during previous years. . ." The Office of Indian Affairs transmitted a copy of Robinson's letter to Superintendent Crane at Keams Canyon, with directions to furnish a prompt report and recommendations. Plf. 199

In his report of June 22, 1914, submitted in response to these instructions, Crane wrote: ". . . The Executive Order of 1882 sets aside specific lands to be used as a reservation for the Hopi Indians *'and such other Indians'* as it may be found necessary to maintain thereon in the judgment of the Secretary of the Interior. Those Navajoes who resided on the reserve at that time, had a right of occupancy, and it is not understood that this right has diminished. . . . The Navajo has been permitted under law to remain thereon, and he must be commended for using and in a comparative sense growing rich on the part of it allowed him. . . ." Def. 245, 246 Def. 247

Crane in effect stated that the Hopis were to blame for their present troubles, having originally had the same opportunity as the Navajos. Whereas the Navajos had an "industrious pushing nature," the Hopis, through indifference, timidity or superstition, persistently clung to the mesas. This had resulted in the denuding of nearby grazing lands and the Hopi now finds, said Crane, "that to procure good grass he must go onto those lands the Navajo has used for generations and protected by frequent movement of herds." Def. 246 Def. 247

According to Crane the Hopis then had practically all the water and no grazing, while the Navajo had sufficient grazing for his large herds in an almost waterless territory. Crane stated that for thirty years the Government "has lavished its help upon the Hopi and has done practically nothing for the Navajo on this reserve. . . ." He called attention to Lt. Plummer's letter of May 30, 1894, which he interpreted as recognizing that Navajo Chief "Comah" and his people were entitled to the area adjacent to Comah Spring, and stated that, in view of that letter, to drive the Navajos from that location "would mean war." Def. 248

Crane recommended against moving the Navajos from the reservation but suggested, instead, that the Government help them develop water "in the so-called 'Navajo sections' of the Moqui Indian Reservation." Crane expressed the view that the Hopis would probably not use the whole reservation if it was placed Def. 250 Def. 251

ef. 270, 272 entirely at their disposal. As will later be seen, Crane subsequently changed his mind as to which tribe was to blame for the troubles on the reservation.

Once more a pressing problem, presented from the field, concerning which the Washington office sought and received detailed information, was permitted to go unsolved. Robinson's urgent letter of May 26, 1914, concerning Hopi grazing problems, regarding which Crane had made a detailed report on June 22, 1914, was apparently "pigeonholed."

ef. 253 A year later Crane, apparently now more sympathetic to the Hopis' grazing problem, complained of the failure to issue directions which would bring relief. He stated that the problem

ef. 254 was becoming "acute, as respects the depredations of the Navajo Indians upon Hopi herds, and general differences arising because of over-lapping grazing areas."

Crane suggested that the problem be met by regulating and fixing definitely the areas within the 1882 reservation to be used by the Hopis and Navajos. Crane reported that Navajos were

ef. 254 seriously impeding advancement of the Hopi people in the holding of the best grazing areas.

Crane also recommended that a delegation of Hopis be sent

ef. 254 to Washington at Government expense to confer with the Office of Indian Affairs concerning their problems. Crane further suggested that if this was not deemed practicable, a council of Hopis and Navajos be called so that the problems can be discussed "and an equitable fixing of boundaries on the reservation made." Adhering to his understanding of the 1882 executive order, first

ef. 259 enunciated by him in 1912, Crane said: "Owing to the language of the Executive Order creating the reservation in 1882, it would seem there is no authority for the deportation of the Navajoes nor is there any location to which they might be deported."

On July 22, 1915, Assistant Commissioner E. B. Merritt replied to Crane, stating that his suggestion that a council of Hopi

lf. 210 and Navajo Indians be called was considered advisable. Crane was instructed to submit detailed plans for such a project. For some undisclosed reason no council was called nor was any other solution of the Hopi grazing problem undertaken at that time.

On April 6, 1916, the then Congressman Carl Hayden, wrote to the then Commissioner, Cato Sells, telling of reports he had received concerning unsatisfactory conditions on the "Hopi"

Reservation. It was his understanding "that the Navajoes are crowding in upon these inoffensive people and are depriving them of the use of considerable areas that are necessary for grazing their flocks." Congressman Hayden expressed the view that "it would be well to have a part of the present Moqui Reservation set aside for the exclusive use of the Hopi Indians."

He further suggested that a representative of the Office of Indian Affairs be sent "into Hopi country with directions to view this problem in all of its phases . . ." Commissioner Sells replied to Mr. Hayden that a "dependable man" would be sent to the reservation for the purpose of making a thorough investigation. Inspector H. S. Traylor was assigned to make this investigation and report. Traylor submitted his report on June 6, 1916. He stated that the Congressman's accusations concerning the Navajos' encroachment upon territory rightfully belonging to the Hopis were true. Calling attention to the arid nature of the area and the fact that springs and wells were sparse, Traylor said that: "To secure this water to supply his flocks and herds the bold Navajo has occupied the greater part of these washes and forced the Hopi back to the mesas upon which he has his villages."

Def. 255

Def. 214, 218

Def. 256

But Traylor placed much of the blame for Navajo encroachments upon territory "rightfully" belonging to the Hopis, upon the Hopis themselves. He characterized the Hopi as "the most pitiable and contemptible coward who now lives upon the face of the earth."

Def. 257

"Were he otherwise than the coward that he is," Traylor continued, "he would prefer to die fighting rather than to surrender the resources of his territory to an enemy." Traylor also reported that the Hopis of those days were weak in other respects. "(T)he Hopi in his love for company, associations, dances, religious rites, and immoral orgies, has preferred the mesa top with its barrenness and lack of sustenance to the watered and grassy valleys of the washes," Traylor stated.

Def. 257

According to Traylor the Navajos were bold, courageous, aggressive, shrewd and keen, good business men, and uncomplaining when the fight went against them, while the Hopis were degenerate in mind and character, cowards, and unprogressive. "(O)ne cannot help sympathizing with the Navajo," Traylor said, but added, "While our sympathies are with the Navajo, it is easily ascertained and recognized that he has made an

Def. 258

unjust encroachment upon the territory set aside for the Hopi . . ."

Def. 259 Traylor called attention to desirable grazing land lying to the west and south of the 1882 reservation, and suggested that some of the Navajos might be persuaded to move there. He expressed the view that the Hopis needed a territory which reaches from Keams Canyon to fifteen miles west of Oraibi and twenty miles north and south of First Mesa. This would give them a land approximately forty-five miles in length and forty in width, or about half the size of the entire reservation.

Traylor proposed that this area be set aside for the use of the Hopis for ten years. If, at the end of that period, they had not
Def. 260 quit the mesa tops and built up their herds and flocks to an extent which would justify them in having that much land, Traylor thought that the Navajos should again be permitted "to occupy and forever keep it."

Def. 256 In his report of June 6, 1916, Traylor evidenced the same understanding as to the 1882 executive order that Supt. Leo Crane had manifested. He stated: ". . . the Executive Order setting aside this reservation states that it was done for the exclusive use of the Hopis and such other Indians as may be residing there. The Navajos were the occupants of at least a part of this territory before the Executive Order was made, and there is no doubt that they are entitled to a part at this time."

Def. 270 On August 11, 1916, Hopi Supt. Crane received instructions from the Commissioner's office in which reference was made to the Traylor report of two months earlier. Until some plan could be worked out whereby the Navajo-Hopi situation might be improved, Crane was told, he and his staff were to use every means at their command "to prevent further encroachment by the Navahos upon the area referred to by the Inspector, but without bloodshed or general disorder."

Crane was also directed to encourage the Hopis to leave the
Plf. 221-222 mesa tops for other places on the reservation. These instructions did not constitute a disposition of Inspector Traylor's recommendations of June 6, 1916, as Crane pointed out in a letter to the Commissioner dated January 24, 1917.

Plf. 223 On March 3, 1917, Assistant Commissioner Merritt advised Crane that Inspector Traylor's report was still under consideration, but indicated that the "situation is one of great perplexity."

Nothing further came of the Traylor report and recommendations.

When the Hopis, encouraged by the Government, began moving down off of the mesas, or at least extending their gardens, friction with Navajos was naturally increased. This was in addition to the friction caused by the extension of Hopi livestock operations. In some instances this caused established Navajo farmers to give way and move back.

Typical of this was the experience which Asdzaan Tsedeshkidni, a ninety-year-old Navajo woman, and her family had. They were living near Beautiful Mountain, she said, and developed a spring close by, "when we have heard the rumbles of the Hopi hoes," as the latter began developing little farms in the area. So she and her family moved across Dinnebito Wash. R. 754, 755 R. 756

In December, 1917, at a hearing before a subcommittee of the House Committee on Indian Affairs having under consideration the current Indian appropriation bill, Congressman Hayden called attention to the Hopi problem and asked whether the Indian Office had considered the advisability of giving the Hopis a definite area of land which they would not have to share with any other tribe. Mr. Hayden disputed Acting Commissioner Merritt's statement at the hearing that the area was set aside primarily for the Hopis, saying "the proclamation said 'for the Moqui and other Indians,' so the Navajo have a right under the law to go in there . . ." Def. 264 Def. 265

At this hearing, Mr. Hayden suggested that the matter be investigated, the tribes consulted in an effort to reach an agreement, and a division of lands be carried out by a new executive order. Assistant Commissioner Merritt stated that his office had "not considered seriously the question of excluding the Navajos from the area," but would now have the matter thoroughly investigated to see what could be done. On January 31, 1918, the Office of Indian Affairs asked Supt. Crane to make such an investigation and submit a full report. Def. 265 Def. 266

Crane's report was submitted on March 12, 1918. Early in the report Crane repeated the same view concerning the objectives of the 1882 order as he had expressed in 1912 and 1914. "The language of the executive order of 1882," he wrote, "practically guarantees to those Navajos or other Indians residing on Moqui at that time equal rights with the Hopi." Def. 266 Def. 268

Since then, according to Crane, the Hopi population and livestock (except for cattle) had remained practically stationary, while the Navajo population had increased and the Navajo livestock holdings had increased fivefold. Part of the increase in the Navajo population had been due to influx from outside the reservation, according to Crane. Intermarriage between Hopis and Navajos had also occurred, he reported.

Crane stated that a few Navajos had documents issued by former Indian agents "to back their claims." The described circumstances, Crane said, "present the first great bar to any wholesale removal of the Navajo from the Moqui Indian Reservation."

f. 269

It was Crane's view, expressed in this report, that the Hopis must be strictly ruled or in a decade they would be "back where they were in 1850." The Navajos, on the other hand, "are indifferent to regulations at best, and the younger generations defiant and undisciplined savages."

Stating that thirty years of agency effort had been devoted almost entirely to the Hopis, Crane said that the Navajos had been given only implements. "The Government since 1868 has neither sought to educate or rule them," Crane complained, and added, "I can find but few instances where any Indian Agent at Moqui has been supported in his troubles with the Navajo. The indifference during the past 11 years has been most marked."

Assuming that the whole reservation contained 3,800 square miles, Crane stated that the entire northern half, roughly two thousand square miles, was in Navajo hands. About three hun-

f. 270

dred square miles of this portion, located in the northwest corner, was under the western Navajo Agent, Crane reported, "and the Hopi would not use (could not) that section if presented with it."

f. Ex. , p. 12

Fourteen years later, in his report of January 1, 1932, H. J. Hagerman confirmed this information concerning administration of the northwest corner of the 1882 reservation. He wrote: "That part of the area described in the 1882 order which is situated in the northwest part of the tract beyond the Dot Klish Canyon is now attached for administrative purposes to the Western Navajo jurisdiction."

Crane stated that, of the remaining 1700 square miles in the northern half of the reservation, about half is so mountainous that it cannot be grazed the year round. Therefore, according to Crane, the Navajos occupying the northern half of the reserva-

tion "are reduced to about 900 square miles of debatable grazing during the winter," the whole area being available to them in late spring, summer and early autumn.

In the southern half of the reservation, Crane stated, the Hopis utilize about six hundred square miles. He added that this area, having been "used up and ruined by the Hopi because of years of restriction . . . is entirely too small for their immediate needs." As to the rest of the southern half of the reservation, about four hundred square miles was barren or worthless and the rest was occupied by Navajos, Crane stated. Therefore, according to his estimate, the Hopis were using and occupying six hundred square miles and the Navajos twenty-two hundred square miles, including the three hundred square miles in the northwest corner. The remainder was, according to Crane, unusable. Def. 270

Crane expressed the view that the Hopi had been disciplined and advanced and had prospered because he could be reached. The Navajo, on the other hand, "may encroach, rob, kill cattle, etc., and then has 3,200 square miles of most inhospitable country in which to hide away." Thus indicating a rather complete change of position as compared to the views expressed four years earlier, Crane also added that the Navajos "have never respected anything save one thing—the uniform of the United States Cavalry." Def. 272 Def. 273

Speaking with courage to his superiors, Crane stated: "In so far as the law-and-order situation on the Moqui Reservation concerns Navajos, this agency has had absolutely no support from the Indian Office. An official letter stating that 'It is a very perplexing question' is not support." Crane documented this section of his report with numerous references to field requests of the Washington office for support and action, some of which went unanswered, others receiving long-belated and equivocal replies, and none resulting in tangible assistance. Crane spoke of the law-and-order problem because, in his view "It is idle to consider the rearranging of a map if one can not compel the Navajo to respect the map. . . ." Def. 273-275

The solution which Crane seemed to favor was to set aside a block of 1,250,000 acres of the reservation for the exclusive use of the Hopis, as Traylor had recommended. If this were attempted the lines of such an area, Crane stated, should be marked by heavy concrete monuments, and a determined force of range men should exercise surveillance. To further ease the policing Def. 276

problem, Crane suggested that a complete census of the Navajos be taken and all those who had "drifted in" since 1882, should be compelled to seek their former homes outside the 1882 reservation.

Plf. 250 Crane's comprehensive report was reviewed by personnel in the Washington office. One intra-office memorandum carried the suggestion that Crane be given a surveyor and crew and instructed to mark off a restricted area such as Traylor had recommended. But, again, nothing was done. On May 5, 1918, Crane reported at length concerning Navajo depredations and the need of effective enforcement.

Plf. 236

On May 25, 1918, 40 Stat. 570, 25 U.S.C. § 211, was enacted prohibiting the creation of any Indian reservation or the making of any additions to existing reservations in the States of New Mexico and Arizona, except by Act of Congress.

7.

From the Act of May 25, 1918, to the Act of March 3, 1927

Plf. 236 On August 23, 1918, Crane again reported at length concerning Navajo depredations and the need of effective enforcement. On September 10, 1918, H. F. Robinson, Supervising Engineer at Albuquerque, New Mexico, sent the Commissioner a similar

Plf. 244 report, stating that the "encroachments of the Navajo Indians on the lands occupied by the Hopi Indians on the Moqui Reservation in Arizona is becoming more acute. . ."

Plf. 248 In commenting upon Robinson's report, the Chief of the Land Division correctly quoted the wording of the 1882 order and stated:

> "It will be contended that the Navajo Indians who were residing on the Moqui Reservation at the time of the executive order, had a right to remain thereon; and doubtless their numbers have increased by the normal method of increasing population."

Def. 278, 287 On May 18 and 19, 1920, hearings were held at Keams Canyon before a subcommittee of the House Committee on Indian Affairs. Robert E. L. Daniel, who was then the Hopi Superintendent,

Plf. 252, 253 stated that five day-schools were then being maintained there for the Hopis only. Daniel stated that the only reason he could give

for this difference of treatment was that the Navajos were nomadic and could not attend a day school.

Daniel was asked what rights the Hopis had to an enlarged acreage in the reservation. This colloquy then occurred:

"Mr. Daniel. The reservation was created by executive order for the Hopi Indians, and the usual jigger in all matters pertaining to Indian reservations slipped in in the form of 'such other Indians that might belong on the reservation.' Mr. Carter. That lets the Navajo in? Mr. Daniel. That lets the Navajo in. It happened at that time that there were practically as many Navajos on the reservation as Hopis." Def. 279

Daniel was then asked whether the Hopi-Navajo problem was "subject to regulation" by the department without legislation by Congress. He replied in the negative. Congressman Hayden confirmed this view, the following exchange taking place: Def. 279

"Mr. Hayden. No. Congress has recently passed an act to the effect that the President should no longer create or enlarge any Indian reservation without authority of Congress, so that the status of all reservations was thereby fixed, and to create a reservation out of part of another one would require a congressional act. Mr. Elston. When this small reservation, especially for the Hopis, was created and with the 'jigger,' the status of all Navajos within this reservation was fixed, had they a right to be there? Mr. Hayden. Yes." Def. 280

In his annual reports for 1920 and 1921, Superintendent Daniel stated:

1920: ". . . the Navajo population has encroached upon the Hopi Indians until they are confined to less than 600 square miles. The Navajo is aggressive, the Hopi is not: as a result of which the Hopi is gradually being deprived of his water, land and pasturage. Unless positive corrective measures are taken by the Government, the Hopi Indians will soon be a charge upon the Government or objects of charity for the public to consider." Pltf. 260.

1921: ". . . the Navajo encroachment upon the Hopi continues without any evidence of Government intervention. For years so much has been said on this subject without results,

it seems a waste of time to repeat the same old information every year."

No action was taken by the Washington office. By October, Plf. 254 1921, the 1882 reservation was said to be occupied by 2,236 Hopis Def. 290 and 2,700 Navajos. Government schooling was then being pro- Plf. 257 vided for 563 of the 648 Hopi children at five day schools on the reservation, and at non-reservation schools. Fifty of the six Plf. 258 hundred Navajo children on the reservation we being given schooling, all of them off of the reservation. The Hopi boarding Def. 290 school at Keams Canyon had been discontinued, as unsafe, several years previously.

Plf. 260 On October 15, 1921, General Hugh L. Scott, a member of the Board of Indian Commissioners, reported that the Navajos were Plf. 256 then encroaching upon the Hopis as they were when he was in the area in 1911. "The Hopi looks in vain," he wrote, "to the Department for protection for although aware of this condition for many years the Government has continued to neglect its duty in providing a remedy."

General Scott later called upon the then Indian Commissioner, Charles H. Burke, to discuss the matter. As a result, Burke, on Plf. 260 November 28, 1921, directed Inspector L. A. Dorrington to visit the reservation and make a thorough investigation, followed by Def. 292 a report and recommendations. Dorrington's report was not to be forthcoming until January 7, 1925.

Def. 297 In his annual report for 1922, Hopi Superintendent Daniel suggested that a rectangular area within the reservation, comprised of twelve hundred square miles as compared to the six hundred square miles the Hopis were then occupying, be set aside for the exclusive use of the Hopis. Under this plan the Def. 294 remaining 2,663 square miles, as the Superintendent computed it, would be set aside and designated as Navajo territory.

Def. Prop. F.F. p. 34 In the summer of 1924, the boarding school at Keams Canyon was reconstructed as a school for Navajo children. The Hopis Plf. 265 immediately protested use of these facilities located on the 1882 reservation for Navajo purposes. On July 16, 1924, the then Hopi Superintendent, Edgar K. Miller, transmitted this protest to the Commissioner. In doing so, Miller indicated that antagonism still existed between the two tribes on the reservation and added: ". . . there must be something done that will set these tribes right as to the policy of the office in the matter."

Upon receipt of the Hopi protest, the Commissioner requested the Inspection Division to advise him whether the Navajos were on the reservation by authority in any form of the Secretary or whether they had just located thereon and acquired their "rights" by sufferance. The Inspection Division, in turn, asked the Land Division to look into the matter "thoroughly" and submit a memorandum. Plf. 266

In the Land Division's answering memorandum, written on July 26, 1924, it was stated by Mr. Marschalk, Chief of that division: "It does not appear that the Navajoes have at any time been especially authorized by this Department to occupy and use any part of the Moqui Reservation, but they have simply been allowed to remain by sufferance, although as before stated, the order of 1882 would seem to include them, or at least those who were there at that time." Plf. 267

Thus, after correctly quoting the 1882 order in this memorandum, the Land Division reached the conclusion that the order was intended to confer immediate rights on Navajos occupying the reservation at that time.

Under date of September 29, 1924, Commissioner Charles H. Burke wrote to the Hopi leaders in answer to their protest against establishing a Navajo boarding school within the reservation, at Keams Canyon. The Commissioner first stated that the records of his office show that "from the earliest times there have been both Hopi and Navajo Indians in the territory known as the Hopi reservation." Then, after correctly quoting the pertinent part of the executive order of 1882, the Commissioner wrote: "It is believed this language was intended to permit Navajo Indians who had lived on the reserve for many years to continue there." Def. 290

Burke also stated, in his letter of September 29, 1924, that Hopi children were being adequately educated in five day schools on the reservation, and at non-reservation schools. He further stated that because Navajo parents "move about so much," day schools were not practicable for their children and that was why a boarding school was being established for them at Keams Canyon.

On January 7, 1925, A. L. Dorrington, who signed "Formerly Inspector," made the report which had been requested of him Def. 292 Plf. 260

in November, 1921. At the outset he repeated the old story: ". . . the Navajo Indians do not recognize any boundaries and have persistently and continuously for fifty years or more crowded
Def. 292 the Hopi Indians back and back, until they are now confined to comparatively small area immediately adjoining their mesas. . ."

Dorrington thought the Hopis might be somewhat to blame for their plight because they had not asserted their rights through diligent effort to use the land. While Navajo encroachments on
Def. 293 the range had continued, Dorrington found that relations between members of the two tribes were otherwise friendly, with considerable visiting of Navajos in Hopi homes, and Navajo attendance at Hopi dances. Dorrington found that the Hopis continued to claim the whole 1882 reservation.

It was Dorrington's recommendation that a rectangular area
Def. 293-294 within the reservation comprising twelve hundred square miles be set aside exclusively for the Hopis. The remaining 2,663 square miles of the reservation to be designated for the exclusive use and benefit of the Navajo Indians "rightfully belonging to
Def. 294 the Moqui reservation." This was, as Dorrington pointed out, the same suggestion Hopi Superintendent Daniel had made in 1922.

Dorrington thought that the twelve hundred square miles should be set aside for the Hopis with the understanding that within a reasonable, specified, time they would, except for the aged, abandon their mesa villages and establish permanent homes in the valleys. Dorrington believed that in order to effectuate this plan it would be necessary to assist them with home building and new school arrangements.

He also stated that in order to insure unmolested Hopi occupancy of the restricted area which he proposed, "necessary action should be taken as will cause all Navajo Indians now encroaching upon the Hopis to return to the respective localities from which they drifted, viz: Moqui, Navajo and Western Navajo reservations and Public Domain." The twelve-hundred-square-mile area which Dorrington recommended would be entirely in the central
Def. 295 part of the southern half of the 1882 reservation.

Def. 296
Def. 299 The Assistant Commissioner requested Hopi Superintendent Miller, who had been at the reservation about sixteen months, to submit his recommendations concerning the Dorrington report.
Def. 297 These were forthcoming on February 27, 1925. In his opinion, Dorrington's report presented only the Hopi's side of the con-

troversy and his proposed solution would cause more trouble and friction than had ever before been evident.

Miller proposed that the matter be carefully investigated by "outside" officials before any action was taken, and that the Navajo's "side" be as completely and thoroughly considered as the Hopi's side. Miller reported that during the last twenty years Navajos had been giving way to the Hopis on the reservation and that the Hopis had prospered and spread out during that period.

It was his opinion that establishment of lines suggested by Dorrington would mean confiscation of property "for a number of prominent Navajos who have been within the confines of the reservation as long as any Hopi." Miller minimized the amount of trouble then being experienced saying that a number of Hopis now live among Navajos "in peace and prosperity."

The Superintendent derided the notion that the Hopis would leave their mesa villages, except by force. He also thought any attempt to divide the reservation would be impracticable because it would necessarily dispossess many Hopi and Navajo homes. Miller was later to change his mind as to this.

The reference in Miller's report, to joint use of sheep dipping vats on the reservation indicates one more respect in which the Government was now assisting Navajos as well as Hopis, within the 1882 area. Def. 298

Miller's critical comments concerning the Daniel-Dorrington proposal apparently brought that suggested solution to a standstill. Nearly a year later, on February 3, 1926, Supt. Miller requested the Commissioner to send a party out to locate and definitely mark the boundary lines of the 1882 reservation. This request was rejected by Assistant Commissioner Merritt. Plf. 283 Plf. 284

On March 31, 1926, Senator Ralph H. Cameron wrote to the Commissioner stating that four Hopi chiefs had waited upon him in Arizona the previous summer. They had requested that either the President or Congress act to make the 1882 reservation "an entire Hopi reserve," and requiring Navajos residing therein to move "to their own reservation." Senator Cameron requested the Commissioner to write to him concerning the matter. Def. 302

Commissioner Burke replied on April 13, 1926. Incorrectly quoting the executive order he stated that the reservation had been set apart for the use and occupancy of the Hopis "and such

other Indians as the Secretary of the Interior may designate." Burke continued: "There were undoubtedly some Navajo In-
Def. 303 dians living on this land before the reservation was set apart; others have gone there since and settled. Their rights must be carefully considered." Burke expressed the further view that while there were some difficulties between members of the tribes, "none of the trouble seems to be serious, and it is believed that any attempt to remove the Navajos would cause more trouble and friction than is the case at present."

Pif. Prop. F.F. p. 59 By the Act of March 3, 1927, 44 Stat. 1347, 25 U.S.C. § 398d, changes in the boundaries of reservations created by executive order for the use and occupation of Indians were prohibited, except by Act of Congress.

8.

From the Act of March 3, 1927, to the Second Hagerman Report, January 1, 1932

On November 19, 1927, two and a half years after he had reported that any division of the 1882 reservation would be impracticable, Supt. Miller changed his mind. In a letter of that
Def. 304 date, addressed to the Commissioner, Miller stated that "the time is opportune to make some preparation for segregating the Navajos and Hopis." He stated that four years' study had convinced him that "the thing will have to be done."

The principal motivation for this change of position appears to have been the fact that the Hopis were "branching out," thus increasing friction between the two Indian peoples. Commis-
Def. 305 sioner Burke replied on December 10, 1927, calling attention to the fact that Miller's new recommendation was contrary to that which Miller had made on February 27, 1925. Miller was called upon to submit a more detailed report.

Miller made this report on January 16, 1928. Miller erroneously denied that he had changed his views but then went on to explain the change of circumstances which now led him to rec-
Def. 306 ommend a division of the reservation. Among these, he said, was the fact that the Hopis had "spread out" since early 1925, causing increased friction with the Navajos.

Another new development, according to Miller, was the "strong and growing disposition among Navajos off this reservation to leave other parts of the country to take up residence on the

reservation. . . ." A third new factor was the increasing boldness of the Hopis in asserting their claim to the entire 1882 reservation. A fourth new circumstance was the Hopi displeasure at the opening of a Navajo boarding school at Keams Canyon. Def. 307

Miller mentioned, as a fifth new development, "the granting of part of the Hopi reservation to Western Navajo for administrative purposes." Miller also frankly stated that the Hopis thought he favored the Navajos "because I am trying to encourage the progress of *both* tribes." Here was another indication of a new official disposition to treat both tribes as having "equal rights."

Miller expressed the view that the best way to accomplish a segregation might possibly be by east-and-west lines through the reserve, giving the Hopis the middle section and the Navajos the north and south sections. Def. 308

He thought an exclusive Hopi agency should then be established for the middle section, with the northern section coming under the Western Navajo Agency and the southern section under the Leupp Navajo Agency.

Miller stated that he had tried to keep the agency at Keams Canyon "neutral and administer the affairs of both tribes in an impartial manner," but "unfortunately" his predecessors had regarded the Navajos as aggressors and had favored the Hopis. It was thus Miller's view that the agency at Keams Canyon had been given the duty of looking after Navajos within the reservation.

On April 13, 1928, Assistant Commissioner Merritt requested Chester E. Faris, District Superintendent at the Southern Pueblo Agency, Albuquerque, New Mexico, to make a careful investigation and a detailed report concerning the proposal for a division of the 1882 reservation. Faris submitted this report on May 12, 1928. He recommended against any division of the reservation as likely to aggravate rather than ameliorate conditions. Def. 309 Def. 321 Def. 310 Def. 310 Def. 318, 319

It was Faris' view that such a division would in any event be impracticable unless a stock-proof fence was built, or close-line riding at "prohibitive" cost was carried on. Faris favored Miller's current efforts to settle small groups of Hopis or Navajos on the so-called "neutral" zone of 150,000 acres of grazing lands, adjacent to suitable water supplies. This effort should be sup- Def. 318 Def. 319

plemented, Faris urged, by range improvement, water development, reduction and elimination of unprofitable stock, and home building.

Def. 320, 321

The Washington office took nearly two years to decide what to do with Faris' 1928 report. Before making that decision, Commissioner Charles J. Rhoads and Assistant Commissioner J. Henry Scattergood visited the area. On March 14 and April 16, 1930, Commissioner Rhoads wrote concerning the matter to Faris, and to H. J. Hagerman, who occupied the position of Special Commissioner to Negotiate with Indians on the Status of Navajo Indian Reservation Land Aequisitions and Extensions.

Def. Ex. 439, p. 126

Pif. 302-303

Def. Ex. 429 title page, p. 121

He requested them, in cooperation with the superintendents of the Hopi-Leupp-Western Navajo Reservations, to make a study of the Hopi-Navajo controversy and to recommend what action should be taken in settlement of that controversy. The Commissioner also authorized A. G. Hutton, Agricultufal Extension Agent, to make an independent investigation and report to Hagerman.

Def. 325

As a part of the investigation, Hagerman and Field Representative H. H. Fiske were authorized to call a conference of Hopis and Navajos. In an apparent further effort to mobilize all possible sources of information on the subject the Commissioner, on May 12, 1930, sent a telegram to Fiske, asking him also to report on the Hopi-Navajo controversy.

Pif. 294

On June 12, 1930, A. G. Hutton submitted to Hagerman and the Commissioner, the report which had been requested of him. He stated that there were then about 2,600 Hopis and 3,550 Navajos within the 1882 reservation. Hutton reported that the areas used by the two tribes were heavily overgrazed but that there was very little Navajo encroachment upon the Hopis. Quite to the contrary, Hutton wrote, the Hopis were moving into areas which the Navajos had occupied for several years.

Def. 324, 325

Def. 327, 330

Hutton recommended against a division of the reservation and also thought that the construction of drift fences was not the correct solution. He believed that it might help in silencing Hopi claims to the whole reservation if the name of the reservation were changed. Hutton also favored a program to improve the livestock being grazed on the reservation.

Def. 329

Def. 330

In Supt. Miller's annual report of June 30, 1930, he stated that he was still for segregation and believed "the time has

Def. 323

arrived for serious consideration of the matter and final action. . . ." He also wrote that the Hopis were getting "so unfair and troublesome and so antagonistic to our agency regulations" that they would have to be ruled by a firmer hand in a territory all their own, if possible.

About the same time that this report was submitted, Miller wrote to the Commissioner transmitting a petition signed by a number of Hopis, together with a sketch showing land claimed by them. These lands included not only the 1882 reservation but practically the entire Navajo Reservation and considerable of the public domain. Def. 332

This was the first of many instances to follow in which, during conferences, and in communications concerning this controversy, some of the Hopis claimed lands greatly in excess of the 1882 reservation area. These exaggerated claims are explained, as Dr. Harold S. Colton later told a Senate subcommittee, by a desire on the part of so-called "orthodox" Hopis to own or control the holy places and shrines where groups of Hopis had worshipped for centuries past. Plf. 299

These shrines are found from Navajo Mountain to the Little Colorado, and from the San Francisco Mountains to the Luckachukas. The Hopi village of Hotevilla, basing its position upon an ancient stone record in the possession of the village chief, apparently claimed the North American continent, from ocean to ocean. Def. 639, Def. 618

While these claims to an extended area were based on Hopi tradition, the fact that claims based on ancient rites were made was by no means unique with the Hopis. It was common for Indian tribes to claim, on such grounds, an area of land much larger than their reservations. As a matter of fact the boundary claimed by the Navajos at that time extended to the city of Albuquerque, New Mexico and included the Jicarilla Apache Reservation. Def. 579

Replying on July 17, 1930, to Miller's letter transmitting the Hopi petition, Commissioner Rhoads stated that their claims to lands "outside the boundaries of their present reservation" could not be favorably considered. After correctly quoting the 1882 executive order, the Commissioner further stated: ". . . it has always been considered that the Navajos have the right to use part of the reservation." Def. 332

Def. 334

The report which had been requested of Fiske on May 12, 1930, was submitted on July 25 of that year. He reported that a census just completed showed 2,472 Hopis and 3,319 Navajos on the 1882 reservation. The efforts of the Government over a long period of time to induce the Hopis to move down from the mesa villages was resulting in some gradual but increasing success, he stated. But it also had made the Hopis, instead of the Navajos, the aggressors.

Def. 334-336

Fiske told of five specific instances in which Hopis had taken over, or had attempted to take over, localities which had been occupied by Navajos for years. The practice of Navajos as well

Def. 336

as Hopis in using sheep dipping vats maintained by the Government, first mentioned by Miller in 1925, was also referred to by Fiske.

Def. 333

"Eighty years of temporizing," Fiske wrote, "have merely held the issue in abeyance." He did not believe it could be solved by

Def. 339

assimilation, and that the only practical solution was to divide

Def. 333

the reservation. Pointing to the uniqueness of the problem, Fiske stated that "there is no other instance within the United

Def. 338

States where two tribes have been assigned with equal rights to a given territory."

While Fiske did not regard the Navajos as interlopers, he did not believe they had gained any "rights" by reason of the fact that they were residing on the reservation in 1882. Fiske wrote: "There is nothing in the wording of the Executive Order to indicate that time of residence had anything to do with the question; but that the Secretary of the Interior might introduce such Indians, of tribes other than the Hopis, as he might see fit to do from time to time."

Def. 337

Fiske thought that Miller's recommendations concerning the acreage to be awarded to the Hopis and Navajos, respectively, were about right. It was his view, however, that Miller's proposed boundaries would dispossess more Indians than necessary,

Def. 339

particularly Navajos. He therefore submitted his own suggestion as to where the boundaries should be placed.

Plf. 297, 298
Def. 360
Def. Ex. 439 p. 126 et seq.
Def. Ex. 439 p. 127, 131

On November 6, 1930, at Flagstaff, Arizona, Hagerman and Faris held the authorized conference of Hopis and Navajos. Four Indian reservation superintendents were present to assist them and eleven Navajos and thirteen Hopis were in attendance. This

was the first time that representatives of the two tribes had been called together to discuss the Hopi-Navajo controversy. . .

In opening the conference, Hagerman stated that there were then about 2,848 Hopis, of whom 2,472 lived within the 1882 reservation, and 376 lived at Moencopi, several miles west of the reservation. There were then about 43,000 Navajos, Hagerman said, of whom 3,319 lived on the 1882 reservation. Def. Ex. 439 p. 127, 128

The Hopi delegates first stated that they were without authority to discuss the question of dividing the reservation. Later two of the Hopi delegates, Tom Pavatea and [redacted]tku expressed the tentative view that it might be best not to attempt a division of the area. Kotku also expressed the view that the 1882 reservation should be extended, although recognizing that it was not entirely a Hopi reservation. One Navajo delegate, Billy Pete, favored a division of the reservation in accordance with Fiske's proposed boundaries. Def. Ex. 439 p. 134

On November 20, 1930, Hagerman and Faris submitted the report which had been requested of them in March and April of that year. They told of the Hopi-Navajo conference, stating that it was there made clear that a Hopi tribal agreement or consent to any specific area or areas which may be set aside for their exclusive use "will be quite out of the question." Def. Ex. 439 p. 121 et seq. Def. Ex. 439 p. 121

Hagerman and Faris expressed the view that unless some definite solution was determined upon by the Government, and then adopted and enforced, "the situation would constantly grow worse. . . ." One view they had attempted to explain at the conference, Hagerman and Faris stated, was that the Indians "can not to any great extent base their present respective territorial claims on much except present conditions." Def. Ex. 439 p. 122

The two officials agreed with the views expressed by Fiske, Miller and Hutton in their independent reports made earlier that year that most of the current "trespassing" was by the Hopis rather than the Navajos. Recommending that a segregation be effectuated, these two officials described specific boundaries of the part which, in their view, should be set aside for the Hopis. Def. Ex. 439 p. 122, 123

Two segregated Hopi tracts were described in the Hagerman-Faris report of November 20, 1930. One of these, containing about 438,000 acres, was located in the south central part of the Def. Ex. 439 p. 122, 123 Map following p. 126

Def. Ex. 439 p. 123

reservation. The other, containing about 23,000 acres, embraced the Hopi colony at Moencopi which was outside of the reservation.

Def. Ex. 439 p. 48

In the opinion of Hagerman, the proposed 438,000-acre tract in the 1882 reservation would include "practically all, if not more than all, the land which has been within the memory of living man used by the Hopi Indians for grazing purposes in this vicinity." Hagerman and Faris stated that if the matter of segregation were accepted in principle, more accurate investigations of surveys in the field would be necessary before the boundary lines of the segregated area could be finally fixed.

Def. Ex. 439 p. 18

A letter dated February 7, 1931, written to Hagerman by Commissioner Rhoads, and countersigned by Ray Lyman Wilbur, Secretary of the Interior, indicates their agreement with the proposal to segregate the two tribes and with the boundaries recommended by Hagerman.

In this letter it is stated that for years it had been the hope of the Department that the Hopi and Navajo Indians would become so friendly and cooperative as to enable them to live in the same country without any jurisdictional or other differences. However, "real amalgamation" had proved virtually impossible, Rhoads wrote, and it therefore appeared that separate districts should be designated for the use of each group "if at all practical."

Def. Ex. 439 p. 48

Def. Ex. 439 p. 48

In his letter of February 7, 1931, Commissioner Rhoads stated that funds were not immediately available to fence the proposed exclusive Hopi area. However, he directed Hagerman, assisted by others, to proceed to more definitely investigate the proposed lines.

Def. 361

Def. 362

In May, 1931, a subcommittee of the Senate Committee on Indian Affairs, held a hearing at Keams Canyon in connection with the subcommittee's general survey of Indian conditions throughout the United States. Hopi Superintendent Miller told the committee that the reservation should be divided between the Hopis and Navajos. The Navajo tribal delegates stated that they favored a division of the reservation, while the Hopi tribal delegates insisted that the 1882 reservation should be for the exclusive use of the Hopis and that all Navajos be moved out.

Def. 362, 363

Plf. 302

Plf. 302

Def. 364, 365

Otto Lomavitu, one of the Hopi delegates at this hearing, did, however, advance an alternative proposal. It was that the Com-

missioner appoint a committee of three or four disinterested men to make a thorough survey of the reservation as to its Indian and livestock population, and its grazing, agricultural, water and other resources.

Lomavitu said this would be done "with the view of making this Hopi Reservation an exclusive Hopi Reservation." He also stated, however, that on the basis of the committee's findings the Commissioner could "make out a suggested boundary for the Hopi reservation."

This suggestion would be submitted to the two tribes for acceptance or rejection. If rejected by either side the matter would be submitted to Congress. In a letter dated December 30, 1931, addressed to Senator Lynn J. Frazier, Assistant Commissioner J. Henry Scattergood indicated that Lomavitu's proposal, summarized above, was being given consideration by the Office of Indian Affairs. Plf. 302-303

On January 1, 1932, H. J. Hagerman submitted to Commissioner Rhoads a comprehensive report concerning his activities as Special Commissioner to Negotiate with Indians on the Status of Navajo Indian Reservation Land Acquisitions and Extensions. He recommended specific outside boundaries for the Navajo Indian Reservation which would comprise 16,541,955 acres. Def. Ex. 439

The reservation so described would include the 3,414,528 acres contained in the original 1868 Treaty, 10,234,997 acres described in ten executive orders and amendments thereof, 179,110 acres described in three Acts of Congress, and 2,713,320 acres consisting of eight tracts then in the public domain. In addition, Hagerman recommended acquisition, by purchase, for the use of the Navajos, of three tracts, comprising 322,560 acres, located outside of the proposed Navajo reservation as defined in the report. This report was published as Senate Document No. 64, 72nd Congress, 1st Sess. Def. Ex. 439

Among the tracts which would be thus included, was the December 16, 1882 Executive Order area, which Hagerman listed as containing 2,499,558 acres. Explaining the inclusion of this area within the proposed over-all Navajo reservation, Hagerman stated that the Hopis "range out for some distance" from the mesa villages, "but occupy only a small portion of the whole so-called Hopi Reservation." He stated that "the whole area is considered and treated as a part of the Navajo Reservation." Def. Ex. 439 p. 4. Def. Ex. 439 p. 12.

Hagerman expressed the view that it would be necessary "to segregate certain reasonable areas for the exclusive use of the Hopis," this to be accomplished or confirmed by Congressional enactment. These views coincided with those which he had expressed in his November 30, 1930 report which had been approved by the Secretary and Commissioner.

Def. Ex. 439 p. 47, 48, 49

In fulfillment of the instructions he had received from the Commissioner, after submitting the earlier report, Hagerman specifically described the area which he believed should be set aside for the Hopis, "embracing approximately 500,000 acres." The boundaries thus proposed accorded exactly with those suggested in 1930, no change being deemed desirable. In Hagerman's view these lines "are fair and just to both the Hopis and Navajos."

Def. Ex. 439 p. 49

9.

From the Second Hagerman Report to the Adoption of the Hopi Constitution in 1936

Plf. 307

On April 25, 1932, Hagerman wrote to the Commissioner stating that a final satisfactory adjustment would be promoted if it were understood that the various Hopi shrines could be identified, surveyed, and set apart for the exclusive use of the Hopis. Answering this letter, Commissioner Rhoads expressed general agreement with the suggestion and stated that this could be done under the general supervisory authority vested in the Secretary without the necessity of legislation.

Plf. 307, 308

Plf. 299

Rhoads requested Hagerman to confer with Dr. Harold S. Colton concerning the location of these shrines. The Commissioner asked to be informed whether such shrines were exclusively Hopi and raised the question whether the Hopis would be reluctant to designate the location of these shrines.

Plf. 308

Under date of June 10, 1932, Dr. Colton wrote to Supt. Miller, giving general information as to the whereabouts of four "Kachina" and six "Eagle" shrines. Dr. Colton explained that the Kachina shrines were the same for all the mesas, but the Eagle shrines belonged to the clans of the different pueblos. The Eagle shrines are associated with the cliffs on which eagles build their nests where, for hundreds of years, the Hopis had gone to procure ceremonial eagle feathers. Colton suggested that if Eagle shrines were set apart for Hopis, this should include rights to the eagle nests on the cliffs.

Plf. 311, 312

In the meantime, on February 8, 1932, the Department of the Interior submitted to Congress, for consideration, a proposed bill defining the exterior boundaries of the Navajo Indian Reservation. The area so described included the 1882 reservation, but there was added a proviso to the effect that so much of the area included within the over-all boundaries as fell within a tract then particularly described ". . . be, and the same is hereby set aside as the Hopi Indian Reservation and should be held for the exclusive use and occupancy of the Hopi Tribe." The area so set aside would be the same as that which Hagerman had recommended for the Hopis in his 1932 report.. Def. Ex. 439 p. 57 Def. Ex. 439 p. 61 Def. Ex. 439 p. 57

The proposed bill defining exterior boundaries of the Navajo Indian Reservation was apparently thereafter changed to eliminate the second proviso to section 1, in which lands therein, set apart for the exclusive use of the Hopis, were specifically described. Instead, the proviso was changed to read, ". . . the Secretary of the Interior is hereby authorized to determine and set apart from time to time for the exclusive use and benefit of the Hopi Indians, such areas within the Navajo boundary line above defined, as may in his judgment be needed for the use of said Indians." Def. 386 Plf. 314

A conference of sixty-eight Hopis, meeting at Oraibi on August 6, 1932, did not find this acceptable and sent a written request to Commissioner Rhoads that he come to the Hopi country to discuss the matter. Commissioner Rhoads replied that it was not practicable for him to travel to the Hopi country at that time. Def. 386

The Commissioner indicated that, if the proposed bill was enacted, the Secretary, after consultation with the Hopis, would then set aside an area for the exclusive use of the Hopis. He asked them to consider, as a suitable area to be set aside for this purpose, the lands within the boundaries which had been originally defined in the second proviso of section 1 of the proposed bill. This was put forward as a tentative suggestion only and the Hopis were invited to submit their views in writing. Def. 387 Def. 387, 388

On September 5, 1932, Otto Lomavitu, President of the Hopi Council of Oraibi, responded to the suggestion that the Hopis express their views in writing concerning the way the Hopi-Navajo problem would be handled in the new form of the proposed bill. He stated that the proposal would be studied but he also inquired, ". . . in whom is the title to this reservation vested. . . ." Hopis or Navajos? Def. 390

Commissioner Rhoads on September 24, 1932, replied that the language of the 1882 executive order reading "and such other Indians as the Secretary of the Interior may see fit to settle thereon," was used:

Def. 392

> "... to take care of a large number of Navajo Indians who were then living within the Executive Order area, as reports on which the Executive Order withdrawal was based indicate that the purpose of the withdrawal was for the joint benefit of the Hopi and Navajo Indians living within the area."

In this letter Otto Lomavitu was also told of new revisions of the proposed bill which were being considered. In November, 1932 five meetings at various Hopi villages were thereafter held to discuss the matter. The Hopis in the three villages on the First Mesa (Walpi, Tewa and Sichumovi) were for allowing the land and agency situation to remain as it then existed.

Pif. 324

Pif. 325

Pif. 324

Those in the Hopi villages on the Second Mesa (Mishongnovi, Shipalovi and Chimopovi), and on the Third Mesa (Oraibi, Hotevilla and Bacabi), except the "conservative" group at Oraibi, were for a distinct Hopi reservation of much greater extent than proposed, and a separate Hopi agency. Two agency officials who reported on these meetings expressed the view that the demands of the Second and Third Mesa Hopis might be substantially reduced after further consideration.

Def. 394, 407

Before the latest version of the proposed bill to define the exterior boundaries of the Navajo Indian Reservation was introduced, and on December 7, 1932, a hearing concerning the problem was held before the Senate Committee on Indian Affairs. Some Hopis who favored a greatly enlarged Hopi area which would include about all of the Navajo reservation were present and presented their views.

Def. 400

Senator Hayden stated, as he had done on other occasions, that the 1882 reservation "was reserved for the benefit of both the Hopis and Navajos." Senator Hayden advocated the setting aside of a definite area for the exclusive use of the Hopis, if that could be done by a satisfactory adjustment between the tribes. If not, Senator Hayden suggested the establishment of separate grazing areas.

Def. 397

Def. 400

Def. 403

In a memorandum, dated December 20, 1932, and addressed to the Secretary of the Interior, Commissioner Rhoads stated that

when the Executive Order of December 16, 1882 was issued, there were, in addition to the Hopis, "a considerable number of the Navajo Indians . . . living within the area withdrawn." "Hence," Rhoads stated, "the language used in the Executive Order was designated to take care of the rights of both groups of Indians in their joint use and occupancy of the lands." Rhoads further advised the Secretary that the 1882 reservation "is considered to be withdrawn for the joint use of both groups of Indians and not for the exclusive use of the Hopi or Navajos . . ."

By the end of 1932, the Indian Office, apparently bowing to Hopi opposition, agreed that the bill extending the exterior boundaries of the Navajo Reservation should contain a proviso that the legislation would not affect the existing status of the 1882 reservation. The new draft of the bill, thereafter prepared, eliminated all reference to a separate area for the Hopis and contained the new proviso referred to above. On January 31, 1933, the Hopis were advised of this change. Pif. 330 Pif. 331

On February 13, 1933, Otto Lomavitu wrote to Supt. Miller, asking two questions concerning the meaning of the December 16, 1882 Executive Order. Miller referred the matter to Commissioner Rhoads who replied on March 11, 1933. Rhoads stated that the new proviso added to the proposed bill saving the "existing status of the Moqui (Hopi) Indian Reservation," fully protected the rights of the Hopi Indians to the executive order area "and also those Navajo Indians who are already living therein." Def. 411 Def. 425

Concerning any royalty income which might later result from the development of natural resources on the reservation, Rhoads stated that "it would appear that such of the Navajos as are permanently residing on the reservation would probably be entitled to share with the Hopis in any income from future mineral production."

The proposed bill defining the exterior boundaries of the Navajo Indian Reservation, and containing the new proviso saving the status of the December 16, 1882 reservation, was introduced in the Senate on February 28, 1933, as S. 5696, 72nd Congress, 2nd Session. The bill made no progress in the 72nd Congress. On June 6, 1933, it was re-introduced as S. 1876, 73rd Congress, 1st Session, but again made no progress. Pif. 334 Pif. 338

A similar bill, with the same proviso, was introduced on January 23, 1934, as S. 2499, 73rd Congress, 2nd Session. The same Pif. 340

Pif. 341 form of bill was introduced in the House of Representatives on April 3, 1934, as H.R. 8927, 73rd Congress, 2nd Session.

Def. 418 While the 73rd Congress bills were pending, further studies were being carried on in the field concerning the exact description of boundaries of an exclusive Hopi area within the 1882 Pif. 211 reservation. A report thereon, made by Joseph E. Howell, Jr., Range Examiner, was submitted on April 16, 1934, to Commissioner John Collier, who had replaced Commissioner C. J. Rhoads Def. 421 the previous year. He proposed extension of the Hopi area which would add 59,225 additional acres, bringing total Hopi acreage Def. 419 in the proposed segregated area to 528,407. This would still not include all Hopi fields, Howell stated.

Pif. 342 On May 5, 1934, Harold L. Ickes, then Secretary of the Interior, Def. 423 wrote letters to the respective chairmen of the Senate and House Committees on Indian Affairs, recommending favorable consideration of S. 2499 and H.R. 8927. In each letter he stated:

> "It is of importance to observe that section 1. . . contains a Def. 424 provision safeguarding the rights of the Hopi Indians to their Pif. 343 lands, which are centrally located within the present Navajo Reservation."

Pif. 342, 344 The Senate and House bills were favorably reported by the re-Def. 423 spective committees, with amendments which, however, left undis-Def. 427, 430 turbed the proviso saving the 1882 reservation area from the effect Pif. 349 of the bill. The bill was enacted in that form, being approved on June 14, 1934, as Chap. 521, 48 Stat. 960-62.

Thus, while the exterior boundaries of the over-all Navajo Indian Reservation, as newly defined, included the area described in the Executive Order of December 16, 1882, the Congress saved the status of that area by incorporating this clause in section 1 of the Act:

> "1. Nothing herein contained shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive Order of December 16, 1882."

Def. 431 Four days later, on June 18, 1934, Congress enacted, as Chapter 576, 48 Stat. 984, the Indian Reorganization Act. Under section 6 of this Act, the Secretary of the Interior was directed to make rules and regulations for the operation and management of Indian forestry units, to restrict the number of livestock grazed on Indian

range units, and to promulgate such other rules and regulations as might be necessary to protect the range from deterioration, prevent soil erosion, assure full utilization of the range, and like purposes.

Under section 16 of this Act, any Indian tribe or tribes, residing on the same reservation were given the right to organize for their common welfare, and to adopt an appropriate constitution and by-laws to become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case might be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he might prescribe.

It was provided in section 18 of this Act that the Act shall not apply to any reservation wherein a majority of the adult Indians voting at a special election duly called by the Secretary of the Interior, shall vote against its application.

Except for the reconstruction of the Keams Canyon facilities as a boarding school for Navajos, and the early Navajo boarding school at Blue Canyon, the first school for Navajos was built on the 1882 reservation at Pinyon in 1935. The Navajo school at Blue Canyon had been moved to Tuba City outside the reservation in about 1910 or 1920. R. 1137 Def. Ex. 594 p. 1

Some time during the first half of 1935, it was determined to consolidate in one general Navajo agency, the northern, eastern, southern and western jurisdictions of the Navajo reservation, and to also include therein the supervision of the Navajos on the 1882 reservation, and the Hopi jurisdiction. The then Acting Superintendent of the Hopi agency, A. G. Hutton, was advised by the Commissioner on July 6, 1935, however, that he would continue to be in charge of the Hopi jurisdiction "for the present." But Hutton was further advised that it was necessary that "all projects and programs of the Hopi jurisdiction be cleared through the General Superintendent of the Navajo area." Def. 432 Plf. 443 Def. 432

On November 6, 1935, the Commissioner, with the approval of the Secretary of the Interior, issued: "Regulations Affecting the Carrying Capacity and Management of the Navajo Range." By their terms these new regulations were expressly limited to the "Navajo Reservation," which, under the Navajo Reservation Act of June 14, 1934, expressly excluded the 1882 reservation. Def. 436-437

Def. 436 These 1935 regulations provided a method of establishing land management districts with the assistance of the Navajo Tribal Council; fixing the maximum carrying capacity for livestock of each such district; conferring with the Navajo tribe or any suitable subdivision thereof, with the object of delegating responsibilities to the tribe or subdivision; establishing, with the advice and consent of the Navajo Tribal Council, methods of range management; and taking such other action as might be deemed necessary to bring about livestock reduction or to establish a land management plan "in order to protect the interests of the Navajo people."

It does not appear that similar regulations, or any regulations covering the same subject matter were promulgated at this time with regard to the 1882 reservation.

Plf. 347 Some time during the first part of 1936, boundaries for the land management districts, as contemplated by section 6 of the Indian Reorganization Act, were defined. They are referred to in a letter to Commissioner John Collier from Navajo General Superintendent E. R. Fryer, dated May 15, 1936. It is therein pointed out that several of the land management districts, as laid out, "cut through the Navajo and into the Hopi country . . ."

Plf. 347 In this letter Fryer stated that Hopi Superintendent Hutton was in agreement with him that "the entire Hopi and Navajo Reservations" should be considered "as one super land management district." Fryer accordingly requested authority for a consolidation of "Hopi and Navajo E C W personnel and funds," and for the placing of all personnel "on the Hopi" who were working on land with land management problems directly into the Navajo land management division. Fryer renewed this recommendation in a letter to the Commissioner dated May 22, 1936. These recommendations came to fruition in 1937, as will later be indicated.

Def. 445 One of the land management districts defined early in 1936 was No. 6, which was intended to include all lands used by the Hopis. The defined boundaries for district 6 were apparently about the same as those which had previously been recommended by Hagerman in 1932 and had been proposed for inclusion in the first draft of the Navajo Indian Reservation Act, as a proviso thereto. The boundaries of district 6 were so described in order to simplify the land use administration of that particular area where Hopis were concentrated, and not with the intention of creating a restricted Hopi reservation.

At this time the Hopi Indians had no tradition of tribal organization. The tribe was composed of a number of self-governing villages which had not joined in common action for more than two hundred years. In recent years, however, a need had developed for a representative tribal body to handle matters outside the scope and competence of the traditional village authorities. Def. 447

The chiefs and leaders of the villages therefore decided to effectuate such an organization, utilizing the procedures provided by the Indian Reorganization Act of June 18, 1934, which was later amended by the Act of June 15, 1935, 49 Stat. 378.

On the day that the latter Act became law, the Hopi Indians of the 1882 reservation accepted the Indian Reorganization Act for application to the 1882 reservation by a vote of 519 to 299, the total votes cast being 818. Def. 446 Def. 449

The Hopi village chiefs and leaders, and a constitutional committee selected by the Hopis, assisted by a Field Representative from the Office of Indian Affairs, thereafter worked three months preparing a constitution and by-laws. Because the exact rights of the Hopis and Navajos upon the 1882 reservation were then undefined, the section in the proposed constitution on jurisdiction limits tribal authority to the Hopi villages and makes provision for negotiation by the tribal council with the proper officials for definition of the reservation. Def. 447

Writing to the Secretary of the Interior on September 16, 1936, Commissioner Collier stated that: "Authority to carry on such negotiation is one of the main motives of tribal organization." This jurisdictional provision, contained in Article I of the Hopi Constitution, reads as follows: Def. 446, 447

> "Article I—Jurisdiction. The authority of the Tribe under this Constitution shall cover the Hopi villages and such land as shall be determined by the Hopi Tribal Council in agreement with the United States Government and the Navajo Tribe, and such lands as may be added thereto in future. The Hopi Tribal Council is hereby authorized to negotiate with the proper officials to reach such agreement, and to accept it by a majority vote." Plf. Ex. 214, p. 1

Several other provisions of the Hopi Constitution have special importance with regard to the Hopi-Navajo controversy. Article VI, section 1(c) embodies the provisions of section 16 of the Def. 858 Plf. Ex. 214

Indian Reorganization Act that organized tribes may prevent the disposition of their property without their consent. Article VII places in the Hopi Tribal Council supervision of farming and grazing upon the lands beyond the traditional clan and village holdings.

Def. 449 The proposed constitution and by-laws were submitted to the voters of the Hopi Tribe on October 24, 1936 for their ratification or rejection. The vote was 651 to 104 in favor of ratification. Plf. Ex. 214 pp. 9, 10 The Secretary of the Interior approved these instruments on December 19, 1936, and they became effective on that date.

10.

From the Adoption of the Hopi Constitution to the Appointment of the Rachford Commission, in November, 1939

Def. 466 As a result of suggestions made in late 1936 and early 1937, by E. R. Fryer, Superintendent of the Navajo Agency, Allan G. Def. 467 Harper was designated by Commissioner Collier to develop a plan of administrative interrelationships between the Hopi and Navajo administrative jurisdictions. On February 17, 1937, Harper submitted such a plan, to which was attached, in addition to Def. 475 his own signature, those of E. R. Fryer, Superintendent Navajo Service, A. G. Hutton, Superintendent Hopi Reservation, and William G. McGinnies, Director, Land Management Service, Navajo Service.

In a preliminary recital contained in the memorandum outlining this plan it was stated that the "theoretical" Hopi Reservation is "much larger than is needed by the Hopis, or, in fact, occupied by them." It was further stated that a large population of Navajos resided and ranged its livestock "within the so-called Hopi Reservation, and has done so for decades."

Def. 477 The plan outlined in this memorandum, which was approved Def. 470, 471 by the Commissioner on March 16, 1937, was intended to rest upon certain general principles, among which were the following: (1) All administrative matters which exclusively concerned either the Hopi or Navajo Indians as separate tribes were to be completely within the jurisdiction of their respective superintendents; (2) all administrative matters which affected the Hopi and Navajo Indians jointly were to be under the jurisdiction of the Hopi Superintendent as to district No. 6, and under the jurisdiction of the Navajo Superintendent as to other land manage-

ment districts; (3) all activities conducted in both jurisdictions which were related to construction and engineering projects and land planning were to be unified and directed by the Land Planning Division of the Navajo Service; (4) all activities in district No. 6 concerned with land use administration were to be administered by the Hopi Superintendent.

Among other things it was proposed in this memorandum that the Navajo reservation and the 1882 reservation be administered, insofar as land use was concerned, as one homogenous unit, divided into land management districts. In laying out individual land management districts within the combined reservations, six (Nos. 1, 2, 3, 4, 5 and 7) were so located that they extended partly within and partly without the 1882 reservation. As before noted, one additional district (No. 6) was entirely within the 1882 reservation and embraced the Hopi villages and adjacent lands. Def. 470 Def. 444 Pltf. Ex. 291

In connection with the proposed division of administrative functions within the 1882 reservation between Hopis and Navajos, the memorandum carries this statement:

> ". . . This arrangement will be tentative until the definite boundary of the Hopi-Navajo reservation shall have been determined. This arrangement is established as a matter of administrative expediency and convenience and shall not be construed in any way as fixing an official boundary between the two tribes, or as prejudging in any way the boundary which is ultimately established." Def. 470

About the same time that Fryer suggested that a plan of administrative interrelationships be developed, he also proposed that the Hopi boundary matter be reopened. The Commissioner requested Fryer to recommend someone to handle this assignment. On March 22, 1937, Fryer replied, stating that the administrative relationships problem had been worked out so satisfactorily that it now seemed unwise to reopen the boundary matter at that time. Fryer wrote: Def. 465 Def. 478

> ". . . If we preserve the grazing rights of the Hopis within District 6, and recognize the complete administrative control of the Hopi Superintendent over this particular area, then there will, in a short time, come a recognition from both the Navajo and Hopi Indians that District 6 is reserved specifically for Hopi use. After this has become fixed in the minds

of both tribes then the determination of a definite boundary will be much simpler than if we were to tackle it now."

Comprehensive grazing regulations for the Navajo and Hopi reservations were approved June 2, 1937, effective as of July 1, 1937. It was recited in the preamble to the regulations that this was being done pursuant to the authority conferred by several cited Acts of Congress, the general grazing regulations of 1935,

". . . and that of the Grazing Committee of the Navajo Tribal Council acting in accordance with a resolution of the Navajo Tribal Council dated November 24, 1935. . ."

It was not recited in the memorandum that the Hopi Tribal Council had acted in the matter. However, the regulations provided that,

Def. 480 ". . . only such part of these regulations shall be enforced on the Hopi Reservation as are not in conflict with provisions of the constitution, by-laws and charter of the Hopi Tribe heretofore or hereafter ratified or any tribal action authorized thereunder: . . ."

Under these regulations the Commissioner of Indian Affairs was given the duty of establishing land management districts based upon the social and economic requirements of the Indians
Def. 481 and the necessity of rehabilitating the grazing lands. The Commissioner was required to promulgate for each district the carrying capacity for livestock, stated in terms of sheep units yearlong, in the ratio of, mules and horses one to five, cattle one to four, and goats one to one.

The superintendents were required to keep accurate records of ownership of all livestock and issue permits for such stock and
Def. 482 the issue of such animals; reduce the livestock in each district to the carrying capacity of the range; require the dipping of live-
Def. 483, 484 stock, and restrict the movement or prevent the introduction of livestock where necessary; regulate the fencing of range and agricultural land; and regulate the construction of dwellings, corrals and other structures within one quarter mile of Government-developed springs or wells.

In these regulations the term "Hopi Reservation," was defined as follows:

"For the purpose of these regulations District 6, as now established by the Navajo Service, shall constitute the Hopi Reservation until such time as the boundaries are definitely determined in accordance with Article I of the Constitution and By-laws of the Hopi Tribe."

On June 28, 1937, Hopi Superintendent Hutton, writing to Navajo General Superintendent Fryer, called attention to several instances in which Navajo Service personnel had sanctioned Navajo encroachments on long-held Hopi grazing and agricultural lands outside district 6. Fryer replied that district 6 should not be recognized by anyone in the Navajo Service as being a reservation since it was merely an area which defined land use as between Navajos and Hopis. Def. 487 Def. 490

At Fryer's suggestion a conference was held on August 12, 1937, at which the exact meaning of the boundaries of district 6 was discussed. This resulted in a memorandum, dated August 25, 1937, prepared by Fryer, in which he stated that district 6 was not a reservation for the Hopi Indians, and Hopis living outside that district were not required to move within the lines of that district. Fryer stated that while it was attempted to include all Hopi range use with district 6, this was impossible in several instances and that there were still Hopis living, grazing and farming outside that district. Def. 493

According to Fryer, Hopis living in districts 3, 4, 5 and 7 had range rights equal to the Navajos in those districts, and that Navajos living in district 6 had the same rights and privileges as the Hopis. On January 27, 1938, however, Fryer wrote Hutton that ". . . we do not believe that Navajos in district 6 should feel that they have rights in that district equal to the Hopis." Def. 529

On October 5, 1937, the Hopi Tribal Council held a special meeting to discuss the operation of the land management districts. In a letter of that date, addressed to the Commissioner, the dissatisfaction of the Hopis with this operation was explained. Pointing out that these districts were created without the approval of the Hopi Tribal Council, the Hopi Council expressed the view that the plan gives control of the greater part of the 1882 reservation to the Navajos. Def. 500

This Navajo control, it was contended, resulted in more Navajos settling on the 1882 reservation, "which will make a satis-

factory settlement of the land question more difficult than ever." The Hopi Council also asserted that district 6, as set up, "does not include nearly all of the area that has been occupied by the Hopi Indians for a good many years."

The Hopi Council stated in this letter:

> ". . . definite boundary lines be set up, giving the Hopi sufficient area on which they can carry on livestock and farming operations so that all the people may be able to make a living, and until such time it is requested that your Office leave the entire Hopi Reservation under the supervision of our Hopi Superintendent."

The Commissioner sent a copy of this letter to Navajo Superintendent Fryer, soliciting his comments. The latter objected to the Hopi Council's suggestion stating that it would "break up the entire land-management scheme." Def. 555

On December 28, 1937, the Commissioner signed and promulgated a map defining land-management districts established within the Navajo and Hopi reservations, and setting down the carrying capacity for livestock in each of the districts. In advising Superintendent Fryer of this action, the Commissioner stated: Plf. 372

> "It is understood, also, and it should be clearly explained to the Navajo and the Hopi counsels [sic], that the delineation of District 6 is not a delineation of a boundary for the Hopi Tribe, but is exclusively a delineation of a land-management unit."

On January 28, 1938, Fryer wrote to Hutton suggesting that he ask the Hopi Tribal Council to send a petition to the Commissioner requesting the appointment of a commission "to establish a reservation for the Hopis." Referring to the conference which had been held in August, 1937, Fryer stated that it was there "understood" that no Hopis would move out of district 6 who had not previously lived outside, and that no new Navajo families would move into district 6. Def. 530, 531

On March 1, 1938, the Hopi Tribal Council adopted a resolution requesting that, beginning July 1, 1938, all funds appropriated "for the Hopi Tribe and Reservation" be allocated to the Hopi Superintendent for expenditure for the benefit of Hopis, as it was before the Navajo Service Agreement of March 5, 1937. Plf. 377

The resolution lists several reasons why, in practice, the agreement of March 5, 1937, was unsatisfactory to the Hopis.

Upon the request of the Hopi Tribal Council, Commissioner Collier and six of his staff officials met with the Hopis at Oraibi, Arizona on July 14, 1938. Fifteen Hopi Tribal Council members and four chiefs attended this meeting. The Commissioner talked at length, expressing the view that Seth Wilson, who had been appointed Hopi Superintendent in place of Hutton, would assist the Hopis towards accomplishing what the Hopis wanted. Def. 566 Def. 571 Plf. 379 Def. 572, 575

The Commissioner announced a new administrative policy under which the Hopi Superintendent would be in immediate administrative charge in district 6. all projects of land development, water development and other projects within that district would be presented to the Hopi Tribal Council for final approval. The only contact with the Navajo Service would be in making use of its technical and supervisory personnel and machinery. Def. 576 Def. 577, 578

Collier also announced that the Keams Canyon School and plant which was located in district 6, would be returned to the jurisdiction of the Hopi Superintendent. He did not indicate whether that school would then become a Hopi school, but it later developed that the school was available to both Navajos and Hopis. Def. 576 Plf. Ex. 291 Def. 687, 688

According to the Commissioner, nothing with regard to the administration of district 6 or the other land management districts "pre-determines or settles anything with regard to the ultimate Hopi Tribal boundary."

A Hopi delegate questioned why it was necessary for a Hopi to obtain a permit in order to establish a home outside district 6. Commissioner Collier replied that the requirement for permits was a part of the grazing regulations and "has nothing to do with the reservation boundary." The Commissioner stated that if a Hopi was already established outside of district 6, Def. 596

> ". . . he stays there and it will be the duty of the Hopi Council and the Superintendent to look after him. Where disagreement arises between him and a Navajo the matter will be referred to the Hopi Superintendent." Def. 597

Navajos already established inside of district 6 would also have a right to stay there, Collier asserted. The Commissioner suggested that the Hopis and Navajo Tribal Councils select committees to negotiate with each other upon the boundary matter. Def. 578, 593, 595

Def. 599, 602
Def. 690
Def. 599

None of the Hopi delegates agreed. Some reasserted the ancient Hopi claims to an extended area and one suggestd that the boundaries of district 6 be made to conform to the boundaries of the 1882 reservation. One Hopi delegate stated in effect that there was nothing to negotiate with the Navajos, and no Hopi negotiating committee would be appointed.

Def. 603, 578

Noting this failure to accept the suggestion that the boundary matter be negotiated, the Commissioner stated that an agency official would be sent out to get the views of the Hopi chiefs, intimating that the Secretary of the Interior would have to make the final decision. Commissioner Collier suggested Dr. Gordon Macgregor as the official to undertake the initial assignment.

Def. 571, 605, 609

Def. 613

On August 1, 1938, the Superintendent of the Hopi Agency and the Superintendent of the Navajo Service entered into a memorandum of understanding, giving effect to the new administrative arrangement which the Commissioner had announced at the Oraibi meeting. In September of that year, Navajo General Superintendent Fryer requested authority to make minor boundary changes in the land management districts to adjust for instances where the present boundaries arbitrarily divided the customary range of an individual or small group. This request was denied, the Superintendent being requested to submit recommended boundary changes to the Washington office for consideration.

Def. 625

Def. 336

Def. 626, 632-633, 644
Def. 644
R. 354, 644, 632

In the meantime studies were in progress concerning the number of Navajos residing within district 6 as it then existed, and the number living within a proposed extension of that district. The study which was made by Gordon Page and Conrad Quoshena of the Department's Soil Conservation Service, also dealt with the number and location of Hopis residing outside that district. A meeting of field officials, including Superintendents Fryer and Wilson, was then held at the Navajo Service office at Window Rock, Arizona, on October 31, 1938, to have a preliminary discussion of the Navajo-Hopi boundary problem.

Def. 644

Def. 695

No completely satisfactory basis on which recommendations could be made for a definite boundary line were arrived at in the discussion. It was agreed, however, that an intensive survey should be made of the area then occupied by Navajos and Hopis and that every effort be made to delineate the actual individual use of the respective claimants.

Page and Quoshena were designated to make this survey with the assistance of range riders. The purpose of the survey was to provide for the consideration of the Commissioner and the Secretary of the Interior as great a fund of factual information as possible concerning the use and need in the area.

While Hopi residences, farms and grazing areas had always been located, for the most part, in the south central portion of the 1882 reservation, this was not true of Hopi wood-cutting activities. They were required to travel to parts of the 1882 reservation a considerable distance from their villages in order to obtain the wood which they needed. On December 16, 1922, the Hopi and Navajo agencies entered into a cooperative agreement governing the cutting and gathering of dead firewood, as well as the cutting of live timber anywhere in the 1882 reservation. Def. Prop. F.F. 295-296

On December 20, 1932, when Commissioner Rhoads had recommended that a "proportionate" area within the 1882 reservation be designated for the exclusive use of the Hopis, he also suggested that "a fire wood reserve . . . be set aside for the Hopis." Def. 409

In August, 1933, Commissioner Collier had rejected a request that the Hopis be permitted to cut timber for small building operations within the San Francisco Mountain area, stating that yellow pine as well as pinon and juniper was available in the Black Mesa country "which is much more accessible and will meet their needs. . ." In Howell's report of April 16, 1934, proposing some extension of the Hopi's area of occupancy, he had pointed out that even the suggested extension of the area of woodland was insufficient and had been badly depleted. Pif. 339

He had also stated that "Some provision must be made for fuel wood, house timbers, and other miscellaneous wood products." In Navajo Superintendent Fryer's memorandum of August 25, 1937, he had stated that, Def. 420

> "Hopi Indians can go outside District 6 for wood. We shall, however, attempt to set aside an area somewhere adjoining District 6 for the exclusive use of the Hopi Indians."

At the Oraibi meeting held on July 14, 1938, Commissioner Collier had suggested that his proposed boundary negotiating committees Def. 579

". . . prepare the description of . . . any timber and wood privileges that are needed by the Hopis, with a view of negotiating for any needed protection or privilege. . ."

No exclusive wood-cutting area for the use of the Hopis was set aside, and since no "negotiating" committees of the kind suggested by Commissioner Collier were ever appointed, there were no negotiations concerning Hopi wood-cutting privileges outside district 6. Instead, they were placed under the same permit system as the Navajos, when it was necessary them to seek wood in district 4 to the north.

Def. 655

This led to misunderstandings and dissatisfaction on the part of both Hopis and Navajos, as indicated by official correspondence had in January, 1939. Despite this permit system, agency officials continued to assure the Hopis that they had timber "rights" in the 1882 reservation extending beyond district 6.

Def. 657

The branch of forestry of the Bureau of Indian Affairs later became responsible for timber management and for the issuance of timber-cutting permits outside of land management district 6. It operated under the direct supervision and control of the agency forester for the Navajo agency. In performing this function the forestry service has never made any distinction between the Navajo reservation and the 1882 reservation outside of land management district 6. Stumpage-rate collections, less ten per cent deducted for an administrative fee payable to the Bureau of Indian Affairs, was uniformly paid to the Navajo tribe.

Def. Prop. F. F. 295

Def. Prop. F. F. 299

In a conference held in Washington, D.C., on April 24, 1939, Commissioner Collier, obviously referring to the entire 1882 reservation, told a committee of Hopi leaders that the Office of Indian Affairs would "protect your timber right . . . to give access to the forests. . ." The need of woodland resources in addition to those available on the 49,100 woodland acres available in district 6 was also indicated by the Gordon B. Page report of December, 1939.

Def. 675

Def. 753

On April 24 and 25, 1939, four Hopi leaders met in Washington with the Commissioner and other agency officials, at which time the Hopis presented a map showing the "sacred area" that the Hopi people desired. The map showed an area much larger than the 1882 reservation, being bounded by Rainbow Bridge and

Def. 671, 685

Def. 671

the Colorado River on the south and east, below Winslow, and almost to Gallup on the west and north.

The Commissioner made it clear that broad claims of this kind could never be recognized. Discussing the question of the division of the reservation into "use" areas, the Commissioner stated that: "Any agreement which is made of use-rights will not be a giving up of this claim." Def. 682

Adverting to the 1882 executive order, Commissioner Collier stated that the land was set aside for the Hopis "and other Indians resident there. . ." He then continued: Def. 683

> "The creation of district 6 was not a finding as to what area the Hopis should occupy. The Hopis were not consulted. The making of the true finding is in the future."

The Hopis were also told that neither the Indian Reorganization Act of June 14, 1934, nor the adoption of the Hopi constitution and by-laws, had any effect on the legal status of the 1882 executive order. Def. 685

In the summer of 1939, intensive efforts were undertaken to assemble information needed in establishing a final division of land use between the two tribes, and in defining a Hopi reservation of exclusive occupancy. A good deal of the field work was performed by the Soil Conservation Service, much of it in the form of a human dependency survey. Such matters as range use and the dependency on this resource, agricultural land potential and developed, sacred areas, population pressures and woodland requirements were investigated. Much of the basic information had, in fact, been collected over a period of the three or four previous years, but was now brought together by Gordon B. Page who had participated in the basic field studies. Def. 696, Def. 702

In November, 1939, C. E. Rachford, Associate Forester, U. S. Forest Service of the Department of the Interior, was designated to head a commission to conduct a further field investigation, study all available information, and make recommendations concerning the boundaries of district 6, and the boundaries of an exclusive Hopi reservation. Rachford's field studies actually got under way on December 4, 1939. Def. Prop. F.F. 92, Def. 708, Def. 702, 708, 710, 714, 715, 716, 717

11.

From the Appointment of the Rachford Commission to the Centerwall Report of July 29, 1942

Def. 825-720

On December 14, 1939, a conference was held at Winslow, Arizona, at which time Rachford, Fryer and Wilson agreed upon four points with regard to the re-examination of the boundaries. These were: (1) the "spiritual" claims of the Hopis would in a measure be satisfied by the compilation of their sacred areas and shrines with an agreement between the two tribes assuring the unmolested use of these areas; (2) the boundary line to be established would be a fixed one, to be fenced wherever topographic conditions made this necessary; (3) peripheral groups should return to their own territory within one year, but isolated Hopis and Navajos long resident in the "territory" of the other tribe should, with the consent of the affected tribe, remain where they were; and (4) in the zones of dispute the boundary line would be established on the basis of continued use, to be considered as establishing the users' "title."

It was further agreed that, on the basis of these points, Rachford would recommend the boundary line. The conference then actually proceeded to apply the points agreed upon to the various areas on the periphery still in dispute, leaving it to Rachford to make final recommendations.

Def. 722-810

Gordon B. Page submitted his report covering district 6 in December, 1939. He reported that 2,619 Hopis and 160 Navajos

Def. 727

were living within the boundaries of district 6 as it then existed. The Hopis lived, for the most part, in eleven villages.

There were four villages on the First Mesa: Polacca, Walpi, Tewa (or Hano), and Skitchumovi, with minor concentrations at Five Houses and Bluebird Canyon. There were three Second Mesa villages: Sipaulovi, Mishongnovi, and Chimopovi, with some people living at the foot of the mesa at Torevu. Four villages were located on the Third Mesa: Oraibi, Old Oraibi, Hotevilla, and Bocabi. The Navajo population within district 6 was located mostly at Keams Canyon, but a few lived along the southern and western boundaries of the unit.

Def. 728

According to Page, almost all Hopi range use outside the then existing boundaries of district 6 was by cattle men, although

Def. 727, 728

there was some sheep grazing outside the district. One reason Hopi cattle ranged so far was that they ranged without super-

vision and, to avoid damaging unfenced agricultural land, they were normally kept ten miles or more from the villages.

Page found that bands of Hopi sheep, or cattle and sheep, were crossing over the southwest, south and southeast lines of district 6 and into districts 5 and 7. Other Hopis permitted cattle to range west and northwest of district 6 into district 3, and beyond the 1882 boundary line on to the Moencopi plateau. A few Hopi bands were also found crossing the northern boundary of district 6 into district 4. Plf. Ex. 291

Page reported that agriculture exceeded all other sources of commercial and non-commercial income in district 6 and furnished forty-four per cent of the total. The percental amounts contributed by livestock, weaving, and the sale of miscellaneous items were small, amounting to twelve, one and three per cent respectively. There were 5,916 acres in cultivation in district 6, about three-fourths of which was planted to corn. Most of the remainder was in orchard (eight hundred acres), beans (530 acres), melons and squash (160 acres), and vegetables (eleven acres). Def. 729 Def. 732 Def. 733

In Page's opinion, slightly more than one thousand acres of additional farm land would be needed to produce those products which were then imported by the Hopis, but irrigation would be needed for some of these additional products. There were 168 acres of agricultural lands within district 6 which were then lying idle, and approximately 950 acres of potential agricultural land. Def. 736 Def. 737

Page found that district 6 had a "carrying capacity" of 17,631 sheep units on the 44,657 forage acres available, but that approximately 31,395 sheep units were being grazed. This indicated the necessity of a 13,764 reduction to reach carrying capacity. Def. 737, 751

Rachford made his boundary report on March 1, 1940. Stating that over four thousand Navajos and nearly three thousand Hopis then lived in the 1882 reservation, Rachford expressed the opinion that "one Indian has the same legal right as another to the land resources on which he is dependent." Def. 817

The Hopis, Rachford stated, had the "moral" right, as the first settlers, to areas then used by Navajos. In his view, however, Def. 818

> ". . . the area involved, its condition, its congested population, and the absence of surplus natural resources simply

preclude the possibility of total exclusion of the Navajos from the large area demanded by the Hopis."

Rachford found much evidence to indicate that, due to the hostility and aggressiveness of the Navajos, the Hopis had been restricted to an area entirely too small for a reasonable expansion
Def. 817, 819 needed to meet the ever-increasing population. He therefore recommended that the Hopis continue the use of such agricultural areas then occupied by the Hopis outside of district 6, stating
Def. 820 that "even this is inadequate." "A solution of the problem must lie," Rachford asserted, "in colonization of the surplus Hopi population on other areas, such as the Colorado River Project at Parker."

Def. 820 Rachford also expressed the view that the Navajo "situation" seemed equally precarious to that of the Hopi. "Here are two tribes," Rachford observed;

> ". . . contending for the same area of land which, if it were possible to do so, would no more than meet the legitimate needs of either tribe."

Under these circumstances, he thought, an equitable adjustment between the two tribes seemed about all that could be done.

Rachford then made seven recommendations, which may be summarized as follows: (1) the Hopis should be assured of the right of ingress and egress to and use of specific areas within the Navajo territory for ceremonial purposes; (2) the boundary line of district 6, extended to include agricultural land outside of the district, then used by the Hopis, should be marked and fenced; (3) a shift of population required by these adjustments
Def. 821 should be made at the earliest possible date, isolated groups accepted by the other tribe being allowed to continue occupancy and use as at present; (4) each superintendent should remove within one year the Indians under his jurisdiction from the areas from which they are excluded; (5) the proposed boundary line may be slightly modified by the two superintendents; (6) the established use of coal, wood and farming fields should be continued; and (7) the Navajo contention that Keams Canyon facilities be made a Navajo agency is unsound.

Def. 821 The land management district boundary changes recommended by Rachford in this report would result in the taking away of 13,512 acres from the then district 6 acreage, 8,568 going to

district 4, 2,988 to district 5, and 1,956 to district 7; and the adding of 34,999 new acres to district 6, all coming from district 7. Thus district 6 would have a net gain of 21,479 acres, bringing total acreage for that district from 499,248 to 520,727. The livestock carrying capacity of district 6, expressed in sheep-units-year-long, would be thereby increased from 17,863 to 18,785. The boundary line as so outlined by Rachford was essentially the same as delimited at the Winslow conference on December 14, 1939. Def. 825

Navajo Superintendent Fryer and Hopi Superintendent Wilson asked for clarification of some of the recommendations made in the Rachford report, and agreed on certain modifications in the revised boundary lines of district 6 which he proposed. In the main, however, the Rachford recommendations and proposed boundaries, based on the points agreed upon at the December 14, 1939 conference, were acceptable to all administrative field officials. During the spring and summer consideration was given to the form of the order which would effectuate these changes, and the procedure to be followed insofar as Hopi and Navajo tribal action might be required. Def. 825, 827, 828 Def. 832 Plf. 392 Plf. 394 Def. 833

On October 9, 1940, the Commissioner submitted a draft of such an order to the Secretary of the Interior for approval. In this draft it was recited that, subject to stated exceptions, the Hopi Indians "shall have the right of exclusive use and occupancy" of that part of the 1882 reservation therein described in metes and bounds. This description conformed to the Rachford boundary proposal as modified by agreement between the Hopi and Navajo superintendents.

This draft of order further provided that the part of the 1882 reservation situated outside of the above-described boundary "shall be for the exclusive use and occupancy of the Navajo Indians," subject to the following provisions. The first of these was to the effect that Navajos who established farming or grazing "rights" within the Hopi part prior to January 1, 1926, "shall have the right to remain occupants of the land they now use. . ." The second proviso was to the effect that Hopis who established farming or grazing "rights" outside of, but adjacent to, the Hopi part prior to January 1, 1926, Def. 848

> ". . . shall have the right to continue occupancy and use of said lands, such rights to be determined by the Commissioner of Indian Affairs."

In a letter to the Secretary which accompanied this draft, the Commissioner described the order as one to govern "the use rights of the Hopis and the Navajos within this area." The Commissioner stated that Indians forced to move by reason of this
Def. 846 order would be compensated for unremovable improvements through the granting of rehabilitation work or other means at the disposal of the superintendent.

It was explained that the exercise of coal, wood and timber rights under rules and regulations of the conservation unit serving the two jurisdictions would be continued. The Commissioner assured the Secretary that the Hopis were not to be disturbed in their use of certain areas within the Navajo jurisdiction for ceremonial purposes. In order to safeguard travel by Hopis to these sacred areas, permits signed by the Navajo Superintendent were to be obtained. The Commissioner stated that it was planned to fence and mark the boundary on the ground as promptly as this could be done.

Def. 859, 861 The draft of this order was submitted to the Department's Solicitor, Nathan R. Margold, who returned it to the Commissioner, disapproved, on February 12, 1941. Noting that the order would exclude the Hopis from the major part of the 1882 reservation without expression of assent on the part of the Indians and without statutory authorization, the Solicitor found the proposed order invalid in three respects.

These were: (1) it was contrary to the prohibitions against the creation of Indian reservations without statutory authority, contained in the Acts of May 25, 1918 (40 Stat. 570, 25 U.S.C., § 211), and March 3, 1927 (44 Stat. 1347, 25 U.S.C., § 398d); (2) it was in violation of the rights of the Hopi Indians within the 1882 reservation; and (3) it was not in conformity with the provisions of the Hopi constitution approved December 19, 1936.

Def. 857 In this opinion the Solicitor stated that the 1882 reservation was not created for the exclusive use of the Hopis, since the Secretary was empowered to settle other Indians therein. The Solici-
Def. 858 tor called attention to previous memoranda in which the Solicitor had held that, where the order contains such a reservation of authority, but over a long period of time there has been no action by the Secretary to introduce other Indians into the reservation, the rights of the named tribe have been deemed exclusive. But the Solicitor added:

"I do not maintain that in this case the rights of the Hopis have become exclusive rights since there were Navajos upon the reservation at the time the 1882 order was promulgated, and Navajos have continued within the reservation in increasing numbers." Def. 888

The Solicitor suggested, as an available alternative, an amendment to the grazing regulations providing that no Navajos shall be issued permits within the Hopi grazing district and no Hopis shall be issued permits within the remainder of the 1882 reservation. A further amendment might be included, the Solicitor stated, to enlarge district 6, to give effect to the proposed revised boundaries. Def. 860

Amendments of this kind would be permissible, the Solicitor ruled, if the Department found that, for the proper protection of the range from destruction and for the effective enforcement of the regulations, it was necessary to separate Hopi and Navajo grazing. Suggesting that there was a factual basis for such a finding, the Solicitor stated:

"It is apparent that the Hopi Tribal Council can control its own members better than it can the intruding Navajos who are ancient enemies. The presence of the Navajos within the Hopi grazing districts is a deterrent to constructive action by the Hopis to protect the range. The friction between the two Tribes makes the enforcement of the regulations difficult."

The Solicitor expressed the view, however, that since the suggested amendments to the grazing regulations would operate to exclude Hopis from the use, for grazing purposes, of the land outside the Hopi unit, ". . . the regulations must have the assent of the tribe." In his opinion, however, a formal agreement or the signing of a document by the Hopi Tribal Council would not be necessary if they were reluctant to take such a position. If the Tribal Council would assist in the execution of the regulations through the issuance of permits within the Hopi unit "and in such other ways as may be appropriate," this would sufficiently demonstrate their acquiescence to meet legal requirements, Margold ruled. Def. 860

In this opinion of the Solicitor two additional important rulings were announced: (1) it would be possible for the Secretary

Def. 861 to use his authority over the settlement of non-Hopis within the reserve to remove Navajo farmers from the Hopi unit; and (2) the Secretary does not have the power to remove the Hopi farmers who may be located outside the Hopi unit but within the 1882 reservation "in view of the use and occupancy rights of the Hopis in that area."

Plf. 409 The Office of Indian Affairs thereafter redrafted the proposed order dealing with use and occupancy of the 1882 reservation, in an attempt to meet the objections of the Solicitor. The revised draft, however, was also disapproved by the office of the Solicitor. In a letter dated April 5, 1941, Assistant Solicitor Charlotte T. Lloyd explained that the revised draft contained no provision for the consent of the Hopis to their exclusion from areas out-
Plf. 410 side district 6, and there was no provision for compensation for the disruption of the farming activity of the Navajos and Hopis who would be uprooted.

Def. 875 876, 877, 878, 880 Further efforts were then made to draft an order pertaining to district 6 which would meet the Solicitor's objections. At the same time the proposed revision of boundary lines was further reviewed. This led to the preparation of a revised description
Def. 880 which would result in a district 6 acreage of 528,823, as compared to the then existing acreage of 499,248, and Rachford's proposal of 520,727.

Under this latest revision of boundaries the carrying capacity of district 6 would become 19,518 sheep units as compared to the then existing capacity of 17,863, and a capacity of 18,785 as proposed by Rachford. On September 4, 1941, the Office of Indian Affairs ruled that in view of the Solicitor's opinion and the provisions of Article I of the Hopi constitution, the proposed
Def. 883, 884 changes in the boundaries of district 6, as revised, should be submitted to the Hopi Tribal Council for consideration and approval.

Def. 890 The proposed changes in the boundaries of district 6 were apparently then submitted to the Hopi Tribal Council. Before acting in the matter, the Council wrote to the Washington office,
Def. 893 through the Hopi Superintendent, propounding ten questions of fact and law. Commissioner Collier replied thereto on October 27, 1941, his letter being approved on January 8, 1942, by Assistant Secretary of the Interior, Oscar L. Chapman.

In answering most of these questions the Commissioner referred to and applied the rulings contained in the Solicitor's

opinion of February 12, 1941. In one question the Council inquired whether the Secretary recognized as "legal residents of the Executive Order approximately 4,000 Navajos and 3,000 Hopis." In his reply the Commissioner stated, in effect, that the Hopis residing on the reservation had the right to the non-exclusive use and occupancy of the entire reservation except to the extent that they might voluntarily relinquish such right. As for Navajo rights, the Commissioner wrote: Def. 891

> "It is our opinion that only the individual Navajos residing on the 1882 Reservation on October 24, 1936, the date of the ratification of the Constitution of the Hopi Tribe by the Hopi Indians, and the descendants of such Navajos, have rights on the Reservation. Since, however, such Navajo Indians do not have a separate organization but are governed by the general Navajo tribal organization, Article I of the Hopi Constitution referring to the 'Navajo Tribe' means the general Navajo tribal organization."

Thereafter the practice continued, as before, of denying grazing permits to district 6 Hopis for use of lands outside of district 6, except where they were able to show that they had historically and continuously grazed their sheep at least a portion of the year outside that district. Def. 894, 895

Early in 1942 the Hopis seemingly attempted to make a test case of this practice, submitting 105 applications by Hopi stockmen for grazing permits on range lands outside of district 6. None of these applications had been approved or signed by any representative of the Hopi Agency. Navajo Superintendent Fryer returned all of these applications "without action" on February 27, 1942, complaining bitterly to the Hopi Superintendent that this effort "has taken all the dignity out of our joint attempt to settle or alleviate the problem." On March 28, 1942, the Hopi Tribal Council unanimously passed a resolution disapproving the Kachford recommendations, as modified, for changes in the district 6 boundaries. Def. 895 Def. 911

In 1942 some of the "Old Oraibi" Hopis who had moved to Moencopi, west of the 1882 reservation, in a 1906 "revolt," desired to move back to Oraibi with their livestock. The Solicitor's office ruled, however, that they had abandoned their use and occupancy rights in the reservation. It was therefore held that the Moencopi Hopis should not be permitted to return unless the Hopi Tribal Council gave formal consent. Def. 897 Def. 416

Pif. 418 On April 18, 1942, Commissioner Collier instructed Willard R. Centerwall, Associate Regional Forester at Phoenix, Arizona, to conduct a new study of the Hopi-Navajo boundary problem. Centerwall was told that in interpreting the needs of the Hopis he was to consider primarily their present range use areas and those upon which they have established grazing rights as of the date that district 6 was established, "rather than the legal or traditional aspects that may be introduced." Collier told Centerwall that it was the desire of the Washington office "that every attempt be made to arrive at an equitable solution of this problem."

Def. 930, 900 Centerwall submitted his report to the Commissioner on July 29, 1942. It carried the approval of Burton A. Ladd, then Superintendent of the Hopi Reservation, and Byron P. Adams, Chairman of the Hopi Tribal Council. J. M. Stewart, then the Navajo Superintendent was not available in the field at that time, but a copy of the report was sent to Washington for Stewart's consideration and approval.

Def. 930, 937, 900

Def. 913, 914 Centerwall stated in this report that the Hopis and Navajos had agreed that all prior grazing use rights should be established as of 1936, when district 6 was established. He also stated that it must be clearly understood that the setting aside of a land management unit for the Hopi Indians,

> ". . . does not create a reservation boundary, since the Hopis would remain entitled to all beneficial use, including the right to any proceeds within the remainder of the 1882 Executive Order Reservation."

Def. 915 It was Centerwall's view, expressed in this report, that full recognition should be given to Navajo Indians who had established "use rights" anywhere within district 6. Another premise of his boundary proposal was that

> ". . . in accordance with Forestry regulations, the right to secure fuel wood anywhere on the 1882 Reservation is reserved by the Hopis."

Postulating his boundary recommendations on these and other conditions, Centerwall recommended, by a metes and bounds description, revised boundaries for district 6. Establishment of

Def. 916 these boundaries would accomplish a substantial enlargement of district 6 acreage and livestock carrying capacity as compared

to the original district 6, and as compared to the boundaries recommended by Rachford as revised:

	Original District 6 Boundaries	Revised Rachford Boundaries	Increase in Rachford over Original
Acres	499,248	528,823	29,575
Sheep Units	17,863	19,518	1,655

	Centerwall Boundaries	Increase in Centerwall over Original	Increase in Centerwall over Rachford
Acres	641,797	142,549	112,974
Sheep Units	24,640	6,777	5,122

The Centerwall report contains a detailed "justification" for the boundary revisions recommended by him. In the four Navajo land management districts (3, 4, 7 and 5) which would lose land to district 6 under this revision, a total of fifty-one Navajo families would be adversely affected. Centerwall stated that this figure probably includes some families that are not entitled to consideration and omits some that are deserving. Def. 928

Grazing lands having a maximum carrying capacity of 3,552 sheep units would be lost to the Navajos under the Centerwall proposal. He stated, however, that most Navajo sheep are only on the ranges in question during a portion of the year and that the actual loss in year-long sheep units would be closer to two thousand. The most important considerations which seem to have governed Centerwall in making these revisions were the recognition of exclusive or predominant prior use and the full utilization of lightly loaded or idle grazing lands. Def. 917, 926, 918, 919, 924, 926

Among other considerations which guided Centerwall were the following: (1) simplifying fencing by getting away from sharp breaks and escarpments; (2) establishing boundaries which are easy to follow and observe; (3) making room for overlapping in grazing use; (4) avoiding the necessity of "splitting" waters; (5) definitely setting out work areas for each Service; (6) simplifying livestock management and movement; (7) eliminating friction between Hopi and Navajo livestock operators; and (8) eliminating "split" administration. Def. 928

In his report Centerwall pointed out that the carrying capacity of district 6 in 1936 was 17,863 sheep units, whereas the Hopis Def. 913

actually maintained livestock requiring a carrying capacity of 31,323 sheep units. Reasoning that compliance with sound range management practices thus required 13,460 sheep units to be grazed outside of district 6, Centerwall,

> ". . . assumed that the Hopi Indians were using grazing lands on the Executive Order Reservation outside the boundaries of Unit 6 at the time Unit 6 was created."

"Such being the case," Centerwall concluded,

> "the Hopis have undoubtedly established prior use rights on lands that are now being used by the Navajos. In like manner, Navajo Indians have established use rights on grazing areas within the Executive Order Reservation boundary and must be given credit for the same."

12.

From the Centerwall Report to the Solicitor's Opinion of June 11, 1946

Walter V. Woehlke, Assistant to the Commissioner, construed this part of the Centerwall report as indicating that Centerwall thought the object of his investigation was to enlarge district 6 so as to provide additional grazing for the thirteen thousand excess sheep units. In a memorandum to the Commissioner, dated August 28, 1942, Woehlke disagreed with Centerwall's theory, as he construed it. "The object of his labors," Woehlke wrote,

> ". . . was to settle the boundary dispute on an equitable basis, not to find range for the excess Hopi livestock. It should be remembered that while the Navajos reduced drastically, the Hopis did not."

Woehlke, who had bitterly assailed the Solicitor's opinion of February 12, 1941, also complained of Centerwall's reliance thereon, saying that Centerwall quoted from that opinion "with a noisy licking of the chops. . ." Referring to the Solicitor's opinion in his memorandum commenting upon the Centerwall report, Woehlke said: "That memorandum was a fine example of the workings of the legalistic mind at its worst."

The Navajo Service, headed by General Superintendent J. M. Stewart, also strongly objected to some of the adjustments proposed by Centerwall. On September 23, 1942, the Hopi and Navajo superintendents sent a joint letter to the Commissioner

indicating that the principal differences arising out of the encroachments of Navajo families on land traditionally and continuously used by the Hopis were about to be removed.

The two superintendents expressed the view that they could make the necessary administrative adjustments in the boundary of district 6 by mutual agreement between the two agencies. In making these adjustments, it was indicated, the superintendents were agreed that: (1) "on-and-off" use (partial use by each tribe) is not desirable; (2) the principal purpose of the establishment of the adjusted district 6 line is the erection of a barrier which would prevent the crowding in of new families of Navajos onto territory used by the Hopis; and (3) it is not the intention of bringing about the removal of permanently settled Navajo families from district 6.

On October 7, 1942, the Commissioner's office authorized them to proceed with that effort on the basis of the Rachford and Centerwall recommendations, modifications agreed upon between them to be submitted to the Commissioner for approval.

Upon receipt of these instructions, the Hopi and Navajo superintendents called a conference of field officials of the two agency offices, which conference was held at Winslow, Arizona, on October 22, 1942. They unanimously agreed to recommend that the boundary line of district 6 be approved as recommended by Centerwall, with three modifications. Def. 938

One of these modifications was to shift back to district 4, an area consisting of five square miles which Centerwall had proposed be taken from district 4 and added to district 6. The conference agreed that this area had historically been used almost exclusively by a particular group of Navajo Indians, and that the new line, consisting of the Oraibi Wash would make an excellent natural boundary.

The other two modifications would result in giving Navajo permittees in district 3 exclusive use of a fifteen-square-mile area, which Centerwall had shifted to district 6, and in giving Hopi permittees in district 6 exclusive use of an area consisting of 5.8 square miles which Centerwall had left with district 3. Both of these modifications were justified by the conference on the ground of equitable distribution of grazing and water rights. Def. 939

The district 6 boundaries thus recommended would add 181,946 acres to the original district 6, as compared to the

142,549 acres which would have been added under Centerwall's
Def. 946 recommendations. The superintendents' recommendations would add a carrying capacity of 5,764 sheep units to district 6, as compared to the 6,777 units which would have been added by Centerwall.

Def. 938 In submitting these boundary recommendations to the Com-
Def. 940, 941 missioner on November 20, 1942, the Hopi and Navajo superintendents also suggested certain administrative policies to be followed. Navajo and Hopi Indians who had established residence on either side of a district boundary would be permitted to continue living there. In such cases, and insofar as practicable, livestock grazing permits would be limited to one district. Grazing
Def. 942 "rights" would be established on the basis of past use. Rights to wood and timber on the whole reservation would be equal.

After a reasonable time in which to make adjustments, Navajo stockmen in districts 3 and 4, to the west and north, would be given no range rights inside district 6. Navajo range rights
Def. 943 along the east and south boundaries adjacent to districts 5 and 7 would be given further consideration. The district 6 boundary would represent a division of the reservation based on range use. Hopis would be assured the right to ingress or egress to areas "within the Navajo jurisdiction" for ceremonial purposes with protection to the extent that police power will permit.

This latter suggestion concerning access to Hopi shrines was consistent with similar recommendations which had been made over a long period of time. It appears to have been advanced
Plf. 302-303 first in December, 1931, when Assistant Commissioner J. Henry Scattergood wrote to Senator Lynn J. Frazier, reporting a suggestion which had come to his attention from the field. As he stated it,

> ". . . the shrines sacred to Hopis that are located in what is at present Navajo reservation land might be fenced and set apart with the understanding by both tribes that the Hopis could always have uninterrupted access to them. Such an arrangement, if consummated, would make it unnecessary to include within the Hopi boundary the intervening land as suggested by the extremists."

Plf. 307 Similar suggestions were made by Commissioner Rhoads in
Def. 409 May, 1932, and December, 1932; Navajo Superintendent Fryer,
Def. 448 in December, 1936; Commissioner Collier, in July, 1938, April,
Def. 579
Def. 681

1939, and October 9, 1940; Walter V. Woehlke, Assistant to the Commissioner, in December, 1939; and C. E. Rachford, in his report of March 1, 1940. Def. 823 . Def. 819-820

A specific provision to this effect was incorporated in a proposed secretarial order prepared in 1937, but never signed. Article IV of the Hopi By-laws, adopted together with the Hopi Constitution in 1936, and still in effect, provides: Plf. 374

> "The Tribal Council shall negotiate with the United States Government agencies concerned, and with other tribes and other persons concerned, in order to secure protection of the right of the Hopi Tribe to hunt for eagles in its traditional territories and to secure adequate protection for its outlying established shrines." Plf. Ex. 214, p. 9

On April 24, 1943, the Office of Indian Affairs approved the boundaries, carrying capacity and statement of administrative policy, as recommended by the two superintendents on November 20, 1942. While the Hopi Tribal Council had approved the Centerwall recommendations it was apparently not asked to act on the modifications proposed by the two superintendents on November 20, 1942, and approved by the Commissioner. In any event, the recommendations were apparently put into effect. Def. 945, 949 Def. 955

A considerable adjustment in place of residence and range use was thereafter made, by both Hopis and Navajos, in order to respect the new district 6 boundary lines and minimize trespass. Many Navajo families, probably more than one hundred, then living within the extended part of district 6, were required to move outside the new boundaries and severe hardships were undoubtedly experienced by some. In April, 1944, the two superintendents met with leaders of the two tribes in an effort to further clarify the adjustment policy.

Commissioner Collier met with Hopi leaders at Oraibi, Arizona, on September 12, 1944, at which time the Hopi claims to the 1882 reservation were once more aired. Stating that the Navajos could not be forced off of the 1882 reservation, the Commissioner made this statement concerning the basis of the Navajo claim to part of the reservation: Def. 957a

> ". . . Now, we don't need to debate as to the number of Navajos there were there or not, they came. The Secretary made a report every year how many there were, and he let them come in each year. In addition he went to Congress

and asked for money for the schools for both the Navajos and the Hopis on the Executive Order, and they gave it to him. . . ."

In a letter to Dr. Arthur E. Morgan, Community Services, Inc., written on December 16, 1944, Commissioner Collier made the following statements concerning the purpose intended to be served by the order of December 16, 1882, the status of Navajo Indians in that reservation, and the pattern of use rights. He said:

". . . Actually the Navajo Reservation was established by treaty in 1868 prior to the Executive order which established the Hopi Reservation. The raiding of Hopi lands is a matter of history, but as a matter of fact it started before 1882, and the action of the President in creating the Hopi Reservation at that time was at least in part an attempt to protect Hopis in an area of their own. The fact that the Government failed to provide protection other than drawing an imaginary line between the Hopi and Navajo must be acknowledged, but at least it was the intention of the Government to assist the Hopis.

". . . There never was any formal opening of the Hopi Reservation to Navajo settlement. The Navajo Indians simply filtered across the Hopi boundary and were never challenged by the Government.

"It is true, as suggested here, that the Executive order did not create an exclusive reservation for the Hopi Indians. The language provided that the land should be 'set apart for the use and occupancy of the Moqui (Hopi) and such other Indians as the Secretary of the Interior may see fit to settle thereon.' The Secretary never officially settled any other Indians on the area but in the absence of any action to eject the Navajo Indians who had filtered into the area it was in time assumed that these Navajo were there with the consent of the Secretary."

On February 14, 1945, Assistant Commissioner Woehlke advised Hopi Superintendent Ladd that construction of fences along the revised district 6 line was designed to protect the interests of Hopi stockmen and to prevent additional encroachments of Navajo livestock on Hopi ranges. "In our judgment,"

Woehlke wrote, "the proposed fences will have no effect on Hopi land claims, but will prove to be a great practical value to the Hopi stockmen."

William A. Brophy, who succeeded Collier as Commissioner of Indian Affairs, gave Hopi leaders the same assurance on April 26, 1945. He stated: Plf. 428

> "I want to assure that any fences built will in no wise be construed as establishing district 6 as the Hopi Reservation, or jeopardize any claims which you may have to other lands. The purpose of the fence is not to mark off the boundaries of the reservation, but merely to prevent cattle and horses from straying; to assist the stockmen in improving the quality of their herds, and in controlling the breeding program by preventing inferior sires from mixing with the herds."

Again, on May 3, 1945, the Commissioner gave the same assurance to Senator Burton K. Wheeler. Stating that district 6 was established in order to protect Hopis against additional encroachments by Navajo stockmen, the Commissioner stated:

> "This was in no sense an establishment of boundary lines of the Hopi Reservation. Those boundary lines still are the lines of the Executive Order reservation."

Despite these assurances that the district 6 lines, and fences erected along them, were not intended to mark a Hopi boundary, it continued to be true, as it had been ever since district 6 was established in 1936, that Hopi stockmen were excluded from moving beyond district 6 into other parts of the 1882 reservation, except upon a showing of pre-existing use.

This disparity between assurances and practice did not go unnoticed. Calling attention to the fact that in the Solicitor's opinion of February 12, 1941, it was ruled that proposed changes in district 6 boundaries could not be made without the approval of the Hopi Tribal Council, that Council asked the Commissioner, on September 23, 1941: Plf. 412, 413

> "If the proposed changes in the present District require the approval of the Hopi Tribal Council, why didn't the original District require the approval of the Council?"

No direct answer was made to that question.

At a meeting held on November 6-7, 1945, attended by several agency officials, a young Hopi leader, Karl Johnson, inquired:

f. 959, 962

> "Now, then, if this District 6 is not to be construed as the Hopi Reservation, and if that land beyond District 6 is still the property of the Hopis, then why can't the Hopis go outside of District 6?"

No answer was made.

f. 966, 970

On June 11, 1946, Felix S. Cohen, then Acting Solicitor of the Department of the Interior, rendered an opinion with regard to the ownership of the mineral estate in the 1882 reservation. Referring to various department records all of which, and more, have been referred to above, the Acting Solicitor expressed the opinion that it was the intention, in creating the 1882 reservation, to set aside the lands for the use and occupancy of the Hopi Indians

f. 969

> ". . . and for the use and occupancy of the Navajos then living thereon, and to permit the continued settlement of Navajos within the area in the discretion of the Secretary."

The Solicitor continued:

> ". . . Had there been any intention of disturbing the Navajos then occupying the area, it would have been a comparatively simple thing to draft the Executive order so as to create a reservation exclusively for the Hopis. But that was not done. The prime need at the time was to provide Indian reservation status for lands long occupied by Hopis and Navajos alike, and to retain administrative authority over the further settlement of Navajos within the area. This was precisely what the Executive order of 1882 accomplished."

The Solicitor noted in his opinion that, with minor exceptions, no action was taken to prevent settlement of Navajos within the

f. 969

reservation until the Department, on January 8, 1942, took the position that the Navajos would not be allowed to settle on the reservation after October 24, 1936, when the Hopi constitution was ratified. Holding that Navajos who had moved into the reservation area before October 25, 1936, were to be deemed settled therein pursuant to the December 16, 1882 order, the Solicitor stated:

> ". . . I do not mean to imply that the Navajos could acquire rights in the reservation through the Secretary's inaction or

through his failure to exercise the discretion vested in him by the Executive order. But the Secretary is not chargeable with neglect in this matter. Throughout the years the Secretary has sought and obtained funds from Congress which have been used for the education of the children of Hopis and Navajos alike, and the grazing of the livestock of both groups has been permitted and regulated by the Secretary. This, to my mind, is conclusive evidence that the settlement of the Navajos on the reservation has been sanctioned and confirmed by the Secretary, and that their settlement is therefore lawful, resulting in the necessity of recognition of their rights within the area."

Concerning the comparative rights of the Hopis and Navajos in the 1882 reservation, the Solicitor ruled in this opinion that it

". . . would be a violation of the clear language of the Executive order to distinguish between the quality of estate acquired by the two groups. . ."

Continuing, the Solicitor stated:

". . . I therefore hold that the rights of the Navajos within the area who settled in good faith prior to October 24, 1936, are coextensive with those of the Hopis with respect to the natural resources of the reservation. It is settled by now, of course, that the mineral estate is in the Indians. See the act of March 3, 1927 (44 Stat. 1347; 25 U.S.C. sec. 398a), and *cf. United States v. Shoshone Tribe of Indians*, 304 U.S. 111 (1938)."

The Solicitor pointed out that the Act of May 11, 1938, 52 Stat. 347 (25 U.S.C. § 396a-f), provides that the unallotted lands of an Indian reservation may be leased for mining purposes, with the approval of the Secretary, "by authority of the tribal council or other authorized spokesmen for such Indians." Holding that the term "such Indians" refers to the Indian owners of the reservation, the Solicitor declined to state whether the authority for such leasing, insofar as the settled Navajos were concerned, should come from the Navajo Tribal Council, or whether a special council should be called to designate representatives of the Navajos of the 1882 reservation. Def. 966, 970

The Solicitor stated that this was an administrative question which should be considered in the first instance by the Indian Service.

". . . No necessity would arise for the preparation of a roll identifying all of the individual Indians entitled to participate in the mineral estate, . . ."

the Solicitor ruled,

"unless it were intended to individualize and distribute among the Indians the proceeds derived from mineral leasing."

13.

From the Solicitor's 1946 Opinion to the Act of July 22, 1958

Def. 942 Following issuance of the Solicitor's opinion of June 11, 1946, official assurances continued to be given that district 6 was not intended as a Hopi reservation in lieu of their rights in the entire 1882 reservation. Thus, on May 12, 1948, Acting Commissioner William Zimmerman, Jr. wrote to an interested citizen,

". . . I wish to assure you that the establishment of District 6 does not modify in any way Hopi rights in the Executive Order Reservation of 1882. . ."

Def. 979 In the late 1940's there was a considerable increase in the amount of joint administrative activity on the 1882 and the Navajo reservations. On May 4, 1948, for example, an agreement of cooperation was drawn up between the Navajo and Hopi agencies for the initiation of soil and water conservation practices. The purpose of the agreement was to effect an organization which would attempt to bring soil erosion under control and assist in rebuilding soil resources. Under this plan the Navajo and 1882 reservations, considered as a unit, were divided into five work areas.

Def. 980 District 6 and several other districts which included 1882 reservation lands, were combined to constitute "work area" No. 4, with headquarters at Keams Canyon. All soil conservation activities were to be under the general supervision of the conservationist in charge, at Window Rock, Arizona. This whole arrangement was considered necessary in order to cover the two reservations on a "watershed basis."

Another example of such intermingling of Navajo and Hopi administrative action is to be found in Secretary of the Interior J. A. Krug's proposal, advanced in his report entitled "The Def. 977, 607 Navajo" issued in March, 1948, that Navajo and Hopi families

be resettled on irrigated land of the Colorado River Indian Reservation in western Arizona. By the spring of 1949, this program was under way.

A third example of such joint agency action is evidenced by a letter dated December 15, 1949, sent by Road Engineer H. E. Johnson, employed by the Navajo Service at Window Rock, to Walter O. Olson, Assistant Superintendent of the Hopi Indian Agency. Johnson therein recommended that the Hopi road department use the Navajo road department in an advisory capacity along the pattern of the old regional office. "All construction, maintenance, and engineering should be inspected and approved by this office," Johnson stated. Def. 982

As another indication of this tendency it may be noted that in 1950 some of the duties and responsibilities of the Washington office concerning both reservations were delegated to an Area office established at Window Rock, with Allan G. Harper as Area Director. Plf. 433 Def. 1006, 1007

Under the Act of August 13, 1946 (60 Stat. 1049, 25 U.S.C. 70, Chapter 959, §1) an Indian Claims Commission was established. Hopi leaders and the Hopi Tribal Council apparently gained the impression that this commission might award them land, and they began referring to that agency as the "Lands Claim Commission." In the summer of 1950, this false impression was brought to the attention of James D. Crawford, then Superintendent of the Hopi Agency, with the suggestion that the Hopis be disabused of the idea that they might obtain more land through some proceeding before the Indian Claims Commission. Def. 983, 98

On September 9 and 10, 1950, the Commissioner made a tour of district 6 of the 1882 reservation, inspecting housing, schools, range and industrial activities, and conferring with the Hopi Tribal Council. A memorandum containing pertinent information was prepared in advance, presumably by the Hopi Agency, for the Commissioner's use in connection with this tour. Def. 986

Among the facts stated in this memorandum were the following: At the Keams Canyon boarding school there were then 138 Navajo children and 75 Hopi children; there were five Hopi day schools and a boarding high school within district 6, attended only by Hopis; the 631,194 acres of land then within district 6 fell into the following categories: 208,134 acres of grassland, 5,639 acres of sagebrush, 309,062 acres of browse, 78,411 acres Def. 989 Def. 991

Def. 1000 of pinon and juniper, 22,818 acres of waste and 7,130 acres of cultivated but unirrigated land; in fiscal 1949, the Hopis owned 2,700 cattle, 1,150 horses, and 9,077 sheep;

Def. 992 ". . . water is a major problem. All of their (Hopis) activities revolve around and are affected by the scarcity and poor availability of water. . . ."

Pif. 435, 436 On March 23, 1951, the trespassing of Navajo cattle and bulls in several areas of district 6 was becoming a serious problem, especially because it interfered with the Hopis' controlled breeding program.

Def. 1004 Hopi complaints of a different kind were aired before a House Subcommittee on Indian Affairs, at a hearing held in Phoenix, Arizona on March 27, 1951. The Hopi Tribal Council had been rendered completely useless by the political conflict within the

Pif. 440 Hopi villages resulting from the stock reduction plan put into effect in 1943. Hopi representatives at the March, 1951 hearing alleged that certain persons affiliated with the Office of Indian Affairs were endeavoring to prevent formation of a new Council.

Def. 1005 The Hopis also complained that their children were not receiving an adequate education, that the Office of Indian Affairs was partial to the Navajos in the determination of the Navajo-

Def. 1006 Hopi rehabilitation program, that the Window Rock Area Office was not interested in them and that the Hopi Agency should be restored and divorced from the Navajos. In a letter dated July 3,

Def. 1004, 1007 1951, addressed to the Commissioner, Associate Area Director Walter O. Olson discussed each such complaint, and expressed the view that none of them were meritorious.

Pif. 441 By July, 1951, the total population of the Navajo Indian Tribe was 69,167 (about six thousand within the 1882 reservation), as compared to a Hopi Indian Tribe population residing

Def. 1006 within the 1882 reservation, of 3,200. The total acreage of the Navajo Indian Reservation, plus the part of the 1882 reservation lying outside of district 6, was then 15,508,033, as compared to 631,194 acres for the Hopis within district 6. Thus the Hopis had about 4.4% of the total Navajo-Hopi population, and were permitted to occupy about 3.3% of the combined land area available to the two tribes.

Def. 1012 In the summer of 1952 there was more trouble brewing along the boundary of district 6. On June 8 of that year Area Director Harper reported several complaints of Navajo livestock tres-

passing, and one complaint that Navajo police were invading Hopi country to enforce Navajo claims on the other side of the boundary.

On April 9, 1954, the Commissioner of Indian Affairs reported to Orme Lewis, Assistant Secretary of the Interior, that the present resource base for both the Hopis and Navajos in the 1882 reservation was inadequate, but that relief might be obtainable by economic development or the discovery and development of mineral resources.

The Commissioner also stated that the entire Navajo Indian Pit. 441
Reservation surrounding the 1882 reservation is

> ". . . overcrowded and overgrazed, and sufficient range is not available to permit relocation of either Navajos or Hopis to other areas within the Navajo Reservation without causing further overcrowding and disruption."

In the Commissioner's view, the Navajos and Hopis were traditionally antagonistic and "successful administration at this time requires a physical separation and clear definition of the rights of the two tribes."

The Commissioner also stated, in the report to the Assistant Secretary that district 6 does not have an adequate supply of Pit. 442
wood for fuel and fence posts. "The establishment of any reservation boundary," he wrote, "should consider the problem of such basic needs as fuel, water, range and farmland." In the Commissioner's view it was desirable to retain subsurface rights in joint ownership until such time as their value and location is determined, as any division thereof prior to development "might later prove unfair."

The Commissioner expressed the opinion that it would be extremely difficult and expensive to determine the Navajos and their descendants who were in residence on the 1882 reservation on October 24, 1936, when the Hopi constitution was ratified. According to the Commissioner, Navajos with rights in the 1882 reservation were also enrolled in the Navajo Indian Tribe, but they should not be allowed to share in the assets of two reservations.

Commencing in 1954, and for each subsequent school year, a careful enumeration was made under the direction of the Commissioner, of all school-age children on the Navajo Indian Reser- Def. Pro F.F. 148

vation, and that part of the 1882 reservation outside of land management district 6, as expanded in 1943. The school census data were used by the Bureau of Indian Affairs to project the necessary planning for school facilities, teachers and school personnel for the ensuing years. In making the annual school census, however, there was no effort to segregate Navajos who were living within the 1882 reservation from those who were living outside that reservation. In fact the authorities who took the census were not even aware of the executive order area.

Def. Prop. F.F. 290

Def. Prop. F.F. 293 Plf. Obj. 74-75

According to the comprehensive Navajo school census taken in 1955 under the supervision of the education department of the Bureau of Indian Affairs, there were 2,929 Navajo children then living in the 1882 reservation. They were not listed separately from the children of other areas but census officials were able to determine this information by consulting data contained in the census records.

R. 1087
R. 1148

The method of regulating traders on the 1882 reservation which attained its final form in 1955, had its beginning many years before. Under the Acts of August 15, 1876 (19 Stat. 176, 25 U.S.C., § 261) and March 3, 1901 (31 Stat. 1058, 25 U.S.C., § 262), the Commissioner had sole power and authority to appoint traders to the Indian tribes and to make rules and regulations governing their selection and operations. General regulations governing licensed traders on any Indian reservation were promulgated on June 29, 1927. On June 1, 1937, special regulations covering trade on the Navajo, Zuni and 1882 reservations were promulgated, and were thereafter amended from time to time.

Def. Ex. 576, 579

On March 20, 1948, the Navajo Tribal Council adopted a resolution purporting to regulate traders on the Navajo Indian Reservation. On May 20 of that year, Martin G. White, Solicitor of the Department of the Interior, rendered an opinion in which it was stated that insofar as tribal lands were concerned, the consent of the tribe to the use of land for business purposes must be obtained, as provided for in the regulations. Thus, the Solicitor ruled, the Navajo Tribal Council may act concurrently with the Secretary in the issuance of traders' permits containing appropriate conditions relating, among other things, to the payment of rent.

Def. Ex. 579

On January 1, 1955, the Commissioner approved resolutions of the Navajo Tribal Council, adopted in 1954, relating to traders'

leases and setting rental rates. Under these procedures the Navajo Tribe granted leases to traders on that part of the 1882 reservation outside of district 6 as well as on the Navajo Indian Reservation, such leases being approved by the Superintendent of the Navajo Agency.

The proceeds received from these leases, nine of which were in existence in 1958, were paid into the Navajo tribal treasury. This was done notwithstanding the direction of the Navajo Area Director, W. Wade Head, on September 17, 1957, addressed to the General Superintendent of the Navajo Agency, that any such rentals should be held in escrow pending final determination of Navajo and Hopi rights in the area outside district 6 and within the 1882 reservation.

Def. Prop. F.F. 300, 301, 302
Def. 1014
Plf. Obj. 77
Plf. Ex. 302
R. 1206

The reference to activity by the Navajo Tribal Council makes it pertinent to note that during all of the time that Navajos resided within the 1882 reservation, they had the same representation in the Navajo Tribal Council as was accorded Navajos residing outside that reservation.

By the summer of 1958, the Hopi population in the 1882 reservation was probably something in excess of 3,200. Most of them resided within district 6, as expanded in 1943. A few had homes, farms or grazing lands in adjoining districts on the 1882 reservation.

Def. 1006
Plf. Prop. F.F. 91

Other Hopi activities then being carried on outside district 6, as expanded, included wood cutting and gathering, the gathering of plants for medicinal, ceremonial, handicraft and other purposes, the visiting of ceremonial and eagle shrines, and a limited amount of hunting.

By the summer of 1958, the Navajo population on the 1882 reservation was about 8,800. This did not include the very few Navajos then living within district 6 as expanded in 1943. The places of residence of the Navajos within the 1882 reservation were scattered quite generally over the entire area outside of district 6. Government schools for Navajo children were then being maintained within the 1882 reservation at Pinyon, Smoke Signal, White Cone, Sand Springs, Dinnebito Dam and Red Lake.

R. 1136

The legislation enabling Hopis and Navajos to seek a court determination of their respective rights in the reservation area was enacted on July 22, 1958, 72 Stat. 402.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

DEWEY HEALING, CHAIRMAN OF THE HOPI TRIBAL COUNCIL OF THE HOPI INDIAN TRIBE, FOR AND ON BEHALF OF THE HOPI INDIAN TRIBE, INCLUDING ALL VILLAGES AND CLANS THEREOF, AND ON BEHALF OF ANY AND ALL HOPI INDIANS CLAIMING ANY INTEREST IN THE LANDS DESCRIBED IN THE EXECUTIVE ORDER DATED DECEMBER 16, 1882,

Plaintiff,

vs.

PAUL JONES, CHAIRMAN OF THE NAVAJO TRIBAL COUNCIL OF THE NAVAJO INDIAN TRIBE FOR AND ON BEHALF OF THE NAVAJO INDIAN TRIBE, INCLUDING ALL VILLAGES AND CLANS THEREOF, AND ON BEHALF OF ANY AND ALL NAVAJO INDIANS CLAIMING ANY INTEREST IN THE LANDS DESCRIBED IN THE EXECUTIVE ORDER DATED DECEMBER 16, 1882; ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, ON BEHALF OF THE UNITED STATES,

Defendants.

No. Civil 579 Prescott

The court having considered all of the evidence and being fully advised makes and enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

Jurisdiction

1. This United States District Court for the District of Arizona, comprised of three judges and convened in the manner authorized by section 1 of the Act of July 22, 1958, 72 Stat. 402, and 28 U.S.C., section 2284, has jurisdiction to entertain and determine this action.

Parties

2. Plaintiff Dewey Healing is the duly authorized chairman of the Hopi Tribal Council of the Hopi Indian Tribe and appears herein for and on behalf of said tribe, including all villages and clans thereof, and on behalf of any and all Hopi Indians claiming any interest in the lands described in paragraph 4 of these findings of fact.

3. There are two defendants one of whom is Paul Jones, the duly authorized chairman of the Navajo Tribal Council of the Navajo Indian Tribe. He appears herein for and on behalf of said tribe and every member thereof, and for each and every Navajo Indian using and occupying, or who has or has had any claim of any right, title or interest in the use and occupancy of, any part, parcel or portion of the lands described in paragraph 4 of these findings of fact. The other defendant is the Attorney General of the United States, on behalf of the United States.

Nature of the Case

4. At issue in this action are the competing claims of the Navajo and Hopi Indians and their respective tribes in and to the lands described in an executive order issued on December 16, 1882, by President Chester A. Arthur. This order reads:

"Executive Mansion,
December 16, 1882.

"It is hereby ordered that the tract of country, in the territory of Arizona, lying and being within the following described boundaries, viz: beginning on the one hundred and tenth degree of longitude west from Greenwich, at a point 36° 30′ north, thence due west to the one hundred and eleventh degree of longitude west, thence due south to a point of longitude 35° 30′ north; thence due east to the one hundred and tenth degree of longitude west, thence due north to the place of beginning, be and the same is hereby withdrawn from settlement and sale, and set apart for the use and occupancy of the Moqui, and such other Indians as the Secretary of the Interior may see fit to settle thereon.

CHESTER A. ARTHUR."

5. By inadvertence the land description set out in the order of December 16, 1882, makes reference to "longitude 35° 30′

north," whereas the reference should have been to "latitude 35° 30' north." As correctly described the tract, situated in what is now northeastern Arizona, is rectangular, being about seventy miles long, north to south, and fifty-five miles wide. It contains approximately 2,500,000 acres, or 3,900 square miles

6. By section 1 of the Act of July 22, 19[illegible] the lands described in the Executive Order of December 16, 1882, were declared to be held by the United States in trust for the Hopi Indians and such other Indians, if any, as theretofore had been settled thereon by the Secretary of the Interior pursuant to such executive order.

7. By the same section of the 1958 act, the Navajo and Hopi Indian Tribes, acting through the chairmen of their respective tribal councils for and on behalf of the tribes, including all villages and clans thereof, and on behalf of any Navajo or Hopi Indians claiming an interest in the area set aside by the executive order dated December 16, 1882, and the Attorney General on behalf of the United States, were authorized to commence or defend in the United States District Court for the District of Arizona, comprised of three judges and convened in accordance with the provisions of 28 U.S.C., section 2284, an action against each other and any other tribe of Indians claiming any interest in or to the area described in such executive order:

> ". . . for the purpose of determining the rights and interests of said parties in and to said lands and quieting title thereto in the tribes or Indians establishing such claims pursuant to such Executive Order as may be just and fair in law and equity. . ."

8. Under section 2 of the 1958 act, the court was authorized to determine whether the Navajo Indian Tribe or individual Navajo Indians have the exclusive interest in any lands within that reservation, it being provided that lands, if any, in which that tribe or individual Indians thereof are determined to have the exclusive interest shall thereafter be a part of the Navajo Indian Reservation. Likewise, and under the same section of the 1958 act, the court was authorized to determine whether the Hopi Indian Tribe, including any Hopi village or clan thereof, or individual Hopi Indians have the exclusive interest in any lands within the reservation, it being provided that lands, if any, in

which that tribe, or any village, clan or individual Indians thereof are determined to have the exclusive interest shall thereafter be a reservation for the Hopi Indian Tribe.

9. This action was instituted pursuant to the authority and jurisdiction thus conferred and for the purposes thus described. The words "Navajo" and "Navaho" refer to one and the same Indian people. The words "Moqui" and "Hopi" refer to one and the same Indian people.

Claims of Parties

10. Plaintiff claims that all of the lands described in the order of December 16, 1882, are held in trust by the United States exclusively for the Hopi Indians and that neither the Navajo Indian Tribe and its villages, clans or individual members, nor any other Indian or Indian tribe, village or clan, has any estate, right, title or interest therein or any part thereof. Plaintiff seeks a decree of this court quieting title to all of these lands in the United States in trust exclusively for the Hopi Indians.

11. Plaintiff further claims that if (but not conceding) some Navajo Indians have been settled on the reservation lands in the manner provided in the order of December 16, 1882, rights and interests thereby acquired, if any, do not inure to the benefit of the Navajo Indian Tribe in general, or to Navajo Indians who have not been settled on the reservation, but only to the group of Navajo Indians actually settled thereon and to their descendants, collectively. Plaintiff also claims that such rights and interests, if any, acquired by a group of Navajo Indians, are not exclusive as to any part of the reservation area, but are coextensive with those of the Hopi Indians.

12. Defendant Jones concedes that the United States holds in trust for the Hopi Indians a portion of the executive order lands, constituting about 488,000 acres and including the Hopi villages located on three mesas, situated in the south central part of the executive order reservation. The lands so conceded to be held in trust for the Hopi Indians are described as follows:

> "Beginning at the northeast corner of section 19, township 28 north, range 14 east, Gila and Salt River Meridian, Arizona, on the southeast bank of the Dinnebito Wash, surveyed; thence in a southeasterly direction to the northeast corner of

township 25 north, range 17 east; thence in a northeasterly direction to the northwest corner of section 33, township 27 north, range 19 east, survey of July, 1891; thence due east four miles to the northeast corner of section 36, township 27 north, range 19 east, survey of July, 1891; thence in a northeasterly direction to the northeast corner of section 30, township 27 north, range 20 east, resurvey of July, 1910; thence in a northerly direction approximately 16 miles to the northeast corner of section 6, township 29 north, range 20 east, unsurveyed; thence west approximately 7 miles to the southwest corner of township 30 north, range 19 east; thence north 2 miles to the northeast corner of section 25, township 30 north, range 18 east, survey of March, 1909; thence west approximately 20¼ miles to the point of intersection of the southeast bank of the Dinnebito Wash with the section line between sections 22 and 27, township 30 north, range 15 east, survey of May, 1909; thence down the southeast bank of the Dinnebito Wash to the point of beginning."

13. Defendant Jones claims that all of the lands described in the order of December 16, 1882, except that which is described in paragraph 12 of these findings of fact, are held in trust by the United States exclusively for the Navajo Indian Tribe. No claim is made on behalf of any member of the Navajo Indian Tribe, or any Navajo Indian using or occupying, or who has or has had any claim of any right, title or interest in the use and occupancy of, any part, parcel or portion of the lands described in the order of December 16, 1882, except as a beneficiary under the Navajo tribal claim. He seeks a decree of this court quieting title to all of the executive order lands, except those described in paragraph 12 of these findings of fact, in the United States in trust exclusively for the Navajo Indian Tribe.

14. Defendant United States, the conceded trustee of all the lands described in the order of December 16, 1882, claims no beneficial interest therein. Assuming the position of stakeholder, it takes no position as between the claims of plaintiff and defendant Jones and asserts no claim on behalf of any other Indian or Indian tribe. The United States, however, originally contended that this court is without jurisdiction because, in its view, the rights and interests to be determined herein present a

political and not a judicial question. This court has heretofore rejected this contention. *Healing v. Jones*, 174 F. Supp. 211, decided May 25, 1959.

15. Hereinafter, in these findings of fact, unless otherwise indicated, references to "defendant" will mean Paul Jones, Chairman of the Navajo Tribal Council, and references to the "parties" will mean Dewey Healing and Paul Jones, representing the Hopi and Navajo Indians and Indian Tribes, respectively.

Establishment of Executive Order Reservation of December 16, 1882

16. The executive order reservation of December 16, 1882, was established for the following purposes: (1) to reserve for the Hopis sufficient living space as against advancing Mormon settlers and Navajos, (2) to minimize Navajo depredations against Hopis, (3) to provide a legal basis for curbing white intermeddlers who were disturbing the Hopis, and (4) to make available a reservation area in which Indians other than Hopis could, in the future, in the discretion of any Secretary of the Interior, be given rights of use and occupancy.

17. It was the official intention, in creating this reservation, that the Hopi Indians would immediately have, subject to the limitation stated in the next succeeding paragraph of these findings, the usual Indian title in and to all parts of the described area, whether or not then actually used and occupied by them, and without the need of any action on the part of the Secretary, express or implied, settling them on the reservation or otherwise confirming their rights therein.

18. Notwithstanding what is said in the next preceding paragraph of these findings, it was also the official intention to reserve the authority in the Secretary, acting within his discretion, subsequently to settle other Indians on the reservation or specified points thereof, thereby effecting whatever limitation upon, or reduction in, then existing Hopi rights of use and occupancy the Secretary might thus desire to accomplish consistent with the law in effect at the time the Secretary exercised such reserved authority.

19. In issuing the Executive Order of December 16, 1882, it was not the official intention thereby to grant immediate rights of any kind or nature to Navajos then living upon or otherwise

using or occupying any part of the reservation area. It was the intention that any such Navajos would remain only by sufferance, subject to being removed upon administrative direction unless and until thereafter settled on the reservation by the Secretary pursuant to his reserved authority under the executive order. It was the intention that any Navajos thereafter entering the reservation area, unless and until settled thereon as stated above, would be trespassers subject to removal upon administrative direction.

Settlement of the Navajos in the 1882 Reservation

20. Navajo Indians used and occupied parts of the 1882 reservation, in Indian fashion, as their continuing and permanent area of residence, from long prior to the creation of the reservation in 1882 to July 22, 1958. The Navajo population in the reservation has steadily increased all of these years, growing from about three hundred in 1882 to about eighty-eight hundred in 1958. During the same period the Hopi population in the reservation increased from about eighteen hundred to something over thirty-two hundred.

21. None of the twenty-one Secretaries of the Interior who served from December 16, 1882 to July 22, 1958, or any official authorized to so act on behalf of any of these Secretaries, expressly ordered, ruled or announced, orally or in writing, personally or through any other official, that, pursuant to the discretionary power vested in him under the executive order he had "settled" any Navajos in the 1882 reservation, or had authorized any Navajos to begin, or continue, the use and occupancy of the reservation for residential purposes.

22. Prior to the years 1909 to 1911, while the second allotment project in the 1882 reservation was in progress, neither the Secretary of the Interior nor any authorized representative of the Secretary, acting in the exercise of the authority reserved under the executive order, expressly or by implication, authorized the Navajo Indian Tribe or any Navajos whether or not then living in the reservation area, to use and occupy any part of the 1882 reservation for residential purposes.

23. The Act of March 1, 1907, 34 Stat. 1015, 1018, authorized the Secretary of the Interior to allot lands in severalty "to the Indians of the Moqui Reservation in Arizona," subject to

the provisions of the Allotment Act of February 8, 1887, 24 Stat. 388. Pursuant to this statute, and on September 16, 1907, the Secretary authorized such a project.

24. On February 25, 1909, Matthew W. Murphy, the special allotting agent, received instructions from Acting Commissioner R. G. Valentine which read in part as follows:

> "Executive Order of December 16, 1882, creates the Moqui or Hopi reserve for the Moqui and such other Indians as the Secretary of the Interior may see fit to settle thereon and the Act of March 1, 1907 (34 Stat. L., 1021), authorizes the Secretary of the Interior to make allotments to the Indians on this reservation in such quantities as may be to their best interest. There is ample authority, therefore, . . . for making allotments in the Moqui reservation to such Navajo Indians as may be located therein and who intend to remain in the reservation. If the Navajos decline to accept allotments in the Moqui reservation of the areas specified herein they can be removed from the reservation, but, in the interests of all persons concerned the Office trusts that they will agree to accept allotments there."

25. The instructions, quoted above, which the Acting Commissioner gave with respect to the second allotment program manifested the intention of the Secretary, proceeding under his authority to settle other Indians, as reserved in the executive order, to confer upon Navajos then residing in the 1882 reservation who intended to remain therein and who agreed to accept allotments therein the right to use and occupy the reservation, consistent with usual Indian title, such rights of use and occupancy, however, being limited to parts of the 1882 reservation not then used and occupied by Hopis. Such rights were not extended to Navajos, though residing in the reservation and intending to remain therein, who declined to accept allotments. The latter were not recognized, pursuant to the authority reserved in the executive order, or otherwise, as having any rights of use and occupancy in the reservation. Nor were such rights extended, at this time, to the Navajo Indian Tribe, as distinguished from individual Navajo Indians.

26. About three hundred Navajos residing in the reservation and who intended to remain there indicated a willingness to receive allotments in the 1882 reservation. Each of them was

designated to receive a described allotment. In 1911 this second allotment project was abandoned and none of the allotments to Navajos or others were approved.

27. The record does not disclose who the three hundred Navajos were who received tentative allotments in the period from 1907 to 1911, or which of these Navajos, if any, were still alive on July 22, 1958 and living on the 1882 reservation, or then had descendants living in the reservation and, if so, who such descendants were. It is therefore not possible to find that any Navajos residing in the reservation on July 22, 1958 derived rights of use and occupancy by reason of the action of the authorized representative of the Secretary, in the years 1909 to 1911, in conferring such rights upon three hundred Navajos who agreed to accept allotments.

28. On May 25, 1918, 40 Stat. 570, 25 U.S.C., § 211, was enacted, prohibiting the creation of any Indian reservation or the making of any additions to existing reservations in the States of New Mexico and Arizona, except by Act of Congress.

29. On September 29, 1924, an official as high as the Commissioner of Indian Affairs for the first time expressed an official view to the effect that Navajos had rights of use and occupancy in the reservation. This was, in fact, the first of thirteen instances during the twenty-year period from 1924 to 1944, when a Commissioner made an official statement or ruling which expressly, or by necessary implication, recognized Navajos as having rights in the 1882 reservation.

30. The statement of September 29, 1924, was made in answer to a protest which Hopi leaders had made against the plan to convert the Keams Canyon facilities into a school for Navajo children residing in the reservation. Referring to the "such other Indians" provision of the executive order, Commissioner Charles H. Burke said: "It is believed this language was intended to permit Navajo Indians who had lived on the reserve for many years to continue there."

31. In one respect there appears to be an inconsistency between what the Commissioner said and what he did. By his statement he seems to have indicated, in effect, that he was settling in the reservation Navajos who had lived therein for many years prior to 1882. But he was apparently, at the same time, making the school facilities at Keams Canyon available to

all resident Navajo children without regard to the number of years their families had lived in the reservation. This is but the first of several instances in which the Commissioner, while verbally seeming to indicate a limited exercise of the discretionary power in favor of Navajos, sanctioned administrative action consistent with a much broader exercise of such power.

32. The 1924 statement and the surrounding circumstances have some tendency to indicate that some Navajos were then settled in the reservation pursuant to an implied exercise of authority under the executive order. This evidence, however, is not sufficient to warrant a finding of fact that Navajos were then settled in the reservation.

33. By the Act of March 3, 1927, 44 Stat. 1347, 25 U.S.C., § 398d, changes in the boundaries of reservations created by executive order for the use and occupation of Indians were prohibited, except by Act of Congress.

34. What is stated in paragraph 32 of these findings of fact concerning a statement made by the Commissioner on September 29, 1924, is likewise true regarding a statement made by the Commissioner on July 17, 1930, to the effect that ". . . it has always been considered that the Navahos have the right to use part of the reservation."

35. Prior to February 7, 1931, except for the settlement of three hundred unidentified Navajos during 1909-1911, neither the Secretary of the Interior nor any authorized representative of the Secretary, acting in the exercise of the authority reserved under the executive order, expressly or by implication, authorized the Navajo Indian Tribe or any Navajos whether or not then living in the reservation area, to use and occupy any part of the 1882 reservation for residential purposes.

36. On February 7, 1931, Indian Commissioner C. J. Rhoads and Secretary of the Interior Ray Lyman Wilbur, joined in a letter to H. J. Hagerman accepting the recommendations made by Hagerman and Chester E. Faris on November 20, 1930, that the 1882 reservation be divided between Hopis and Navajos. This 1931 blanket and all-inclusive recognition of Navajo rights of use and occupancy is explainable on no other basis than that the Secretary, impliedly exercising the authority reserved to him in the executive order, was then and there settling in the 1882 reservation all Navajos then residing in that reservation.

37. The events and official pronouncements between February 7, 1931 and July 22, 1958, indicate that all Navajos entering the reservation for purposes of permanent residence were impliedly settled therein by the Secretary or his authorized representative, at or shortly after the time of entry, and that on July 22, 1958, all Navajos residing in the 1882 reservation were accordingly settled therein pursuant to the Executive Order of December 16, 1882.

38. Beginning with the approval, on June 2, 1937, of grazing regulations the authority for which rested in part on a resolution of the Navajo Tribal Council, dated November 24, 1935, the Navajo Indian Tribe itself was impliedly settled in the 1882 reservation pursuant to an exercise of the authority conferred by the Executive Order of December 16, 1882.

39. Implied Secretarial settlement of Navajos and the administrative policy of segregating Navajos from Hopis, were initiated at the same time. The implied settlement of Navajos in the 1882 reservation was at all times subject to this segregation policy. Accordingly, there was never any administrative intention to settle Navajos in that part of the reservation in which the Hopi population was concentrated, and neither individual Navajos nor the Navajo Indian Tribe were ever so settled.

40. This limitation upon the area of Navajo settlement was not administratively fixed by the establishment of final and exact boundary lines until April 24, 1943. The boundary line was then finally and exactly fixed by the Office of Indian Affairs in approving revised boundaries for land management district 6, as proposed by Willard R. Centerwall, with certain modifications. District 6, as so defined, was thus reserved exclusively for Hopis.

41. The boundary line of district 6, as approved on April 24, 1943, is as follows:

> Starting at the section corner between Sections 3 and 4, Township 28 North and Range 14 East. This corner is located 24.75 chains due South and then 54.35 chains due West from Windmill M-174. The corner is steel and is located on the West bank of the Dinehbito Wash. It is located a few chains West of the wash. The boundary runs South of this corner to the center of the wash which distance is about 2 chains. From the above mentioned corner the boundary runs North 25° 10′ West to Howell Mesa escarpment in

Section 20, Township 29 North, Range 14 East. It then goes in a northerly direction along said escarpment until the Tuba City-Hotevilla road is intersected in the South half of Section 28, Township 30 North, Range 14 East. The boundary then follows the road until it reaches the center of the Dinehbito Wash about on the section corner common to Sections 22, 23, 26 and 27, Township 30 North, Range 15 East. The boundary then follows the center of the Dinehbito Wash in a northeasterly direction until it intersects a line going North 45° West from the quarter corner between Sections 17 and 20, Township 30 North and Range 16 East. This line is approximately 43 chains long. The boundary then follows said line Southeast to the quarter corner between Sections 17 and 20, Township 30 North, Range 16 East. The boundary then follows the section line due East from the said quarter corner for 4.5 miles to the section corner common to Sections 13 and 24, Township 30 North, Range 16 E. and Sections 18 and 19, Township 30 North, Range 17 East, then turns an angle and goes North 42° East for a distance of approximately 2.2 miles until the escarpment on the East side of the valley is encountered in the NW¼ of Section 8, Township 30 North, Range 17 East. The boundary then follows this escarpment in a southerly direction until the most southerly point in the escarpment is reached in the E/2 of Section 16, Township 30 North, Range 17 East. The boundary then goes .4 miles South 23° East at which point it reaches the Oraibi Wash in the NW¼, Section 22, Township 30 North, Range 17 East. The boundary then follows the West bank of the Oraibi Wash in a northeasterly direction until a point 200 yards above the Hardrocks Diversion Dam is reached. The boundary then turns an angle and follows a line South 57° 30′ East for a distance of approximately five miles until it reaches the buck pasture fence in the SW¼, Section 15, Township 30 North, Range 18 East.

The boundary then follows the buck pasture fence Southwesterly for approximately .4 miles in the NW¼, Section 22, Township 30 North, Range 18 East. Thence Southeasterly along the buck pasture fence for approximately .4 mile in the NW¼, Section 22, Township 30 North, Range 18 East. Thence Northeasterly along the buck pasture fence for ap-

proximately 3 miles to a point in the NW¼, Section 18, Township 30 North, Range 19 East. Then Southeasterly along the buck pasture fence for approximately 1 mile to the SE¼, Section 18, Township 30 North, Range 19 East. Thence Northeasterly along the buck pasture fence approximately .2 mile to the point on the section line between the SW quarters of Sections 17 and 18, Township 30 North, Range 19 East. Then South 76° 30′ East following the Existing Boundary fence to a point 1,879 feet due North of Section corner between Sections 23, 24, 25 and 26, Township 30 North, Range 19 East. This section corner is located near water well H 11 which is known as Cat Springs. Then South 54° 15′ East following the Existing Boundary fence to a point in Bingham's Lake approximately 8 miles South of Latitude 36° 00′ and 4.25 miles West of Longitude 110° 00′.

From this point in Bingham's Lake the boundary then runs South 38° 00′ West following the Existing Boundary fence until it intersects the Jeddito Wash. The intersection takes place at the same point as Longitude 110° 15′ intersects the wash. The boundary then follows the center of the wash to the point where the Township line between Townships 24 and 25 North intersects the wash. The boundary then follows the Township line due West following the Existing Boundary fence for 2.3 miles at which point it goes North 45° 57′ West following the Existing Boundary fence for approximately 25.6 miles until it intersects the Dinehbito Wash at the same point as the Township line between Townships 27 and 28 North. The boundary then follows the center of the Wash 8 miles up to the point where it intersects the line running due South of the corner between Sections 3 and 4 Township 28 North, Range 14 East.

42. The Navajo Indian Tribe and all individual Navajos residing in the area on July 22, 1958, were authorized to settle in all parts of the reservation outside of district 6 as defined on April 24, 1943, and neither the Navajo Indian Tribe nor individual Navajo Indians were authorized to settle within that district as so defined.

43. No Indians or Indian tribes other than Navajos were ever settled in the 1882 reservation pursuant to the authority vested

in the Secretary under the Executive Order of December 16, 1882, and no Indians or Indian tribes other than Hopis and Navajos have any right or interest in the 1882 reservation.

Other Events and Circumstances Bearing upon Relative Rights and Interests of Hopis and Navajos in Part of Reservation outside of District 6, as Defined in 1943

44. Only a very few Hopis have ever resided or grazed livestock, in that part of the reservation lying outside of district 6, as defined on April 24, 1943. During the years, however, they have continuously made some use of a large part of that area for the purpose of cutting and gathering wood, obtaining coal, gathering of plants and plant products, visiting ceremonial shrines, and hunting.

45. Congress at no time enacted legislation designed to, or having the effect of, terminating Hopi rights of use and occupancy anywhere in the 1882 reservation.

46. Beginning on February 7, 1931, administrative officials followed a policy designed to exclude Hopis, for the most part, from the part of the reservation in which Navajos were being settled by implied Secretarial action. At first they sought to accomplish this by legislation in the form of a provision in the bill which was to become the Navajo Indian Reservation Act of 1934. This attempt failed of realization. Thereafter, and beginning about 1937, the administrative effort to exclude Hopis from the part of the reservation in which Navajos were being permitted to settle, took the form of grazing regulations and a permit system under which Hopi use of reservation lands was restricted.

47. In 1941, Indian Affairs officials sought to formalize this exclusion policy by means of an order of the Secretary of the Interior defining areas of exclusive occupancy. But the solicitor of the department, on February 12, 1941, ruled that this could not be done without the consent of the Hopis, and no such consent was sought or obtained. Despite this legal advice the Office of Indian Affairs, through enforcement of the grazing regulations and permit system, continued the practice of excluding Hopis without their consent from that part of the reservation lying outside of district 6, insofar as residential or grazing use was concerned.

48. None of these administrative regulations and practices, however, were designed to affect whatever rights the Hopis then had in the entire 1882 reservation. This is established by the repeated and consistent representations made by administrative officials during all of this period.

49. The failure of the Hopis, prior to the settlement of Navajos, to use a substantially larger part of the 1882 reservation than is embraced within district 6, was not the result of a free choice on their part. It was due to fear of the encircling Navajos and inability to cope with Navajo pressure.

50. After the official settlement of Navajos in the 1882 reservation, the failure of the Hopis to make substantial use of the area beyond district 6 was not due to a lack of desire or a disclaimer of rights on their part, but to their exclusion from that area by Government officials. Throughout this entire period they continued to assert their right to use and occupy the entire reservation area. These Hopi protestations would doubtless have been even more persistent and vehement had it not been for the constant assurances given to them by Government officials, that their exclusion from all but district 6 was not intended to prejudice the merits of the Hopi claims.

51. As a practical matter, the Secretarial settlement, of Navajos in the part of the 1882 reservation outside of district 6, even without Governmental restraint, probably would have greatly limited the amount of surface use the Hopis could have made of that part of the reservation. But there still would unquestionably have been a substantial movement of Hopis into the area had it not been for the administrative barrier and improper Navajo pressure.

52. Neither before nor after the Secretarial settlement of Navajos, did the Hopis abandon their previously-existing right to use and occupy that part of the 1882 reservation in which Navajos were settled.

CONCLUSIONS OF LAW

1. This United States District Court for the District of Arizona, comprised of three judges and convened in the manner authorized by section 1 of the Act of July 22, 1958, 72 Stat. 402, and 28 U.S.C., section 2284, has jurisdiction to entertain and determine this action.

2. By the force and effect of the Executive Order of December 16, 1882, and without the necessity of any concurrent or subsequent act of the Secretary of the Interior settling it thereon, and without restriction to the parts of the reservation then used and occupied by it, the Hopi Indian Tribe, on December 16, 1882, for the common use and benefit of the Hopi Indians, acquired the non-vested right to use and occupy the entire reservation described in that executive order, both as to the surface and subsurface including all resources, subject to the paramount title of the United States, and subject to such diminution in the rights of use and occupancy so acquired as might thereafter lawfully result from the exercise of the authority reserved in the Secretary to settle other Indians in the reservation.

3. Neither the Navajo Indian Tribe nor any individual Navajo Indians, whether or not living in the reservation area, in 1882, gained any immediate rights of use and occupancy therein by reason of the issuance of the Executive Order of December 16, 1882, or by reason of any other fact or circumstance, save and except by the exercise, after December 16, 1882, of the authority reserved in the Secretary of the Interior, under the Executive Order of December 16, 1882, to settle other Indians in that reservation.

4. Prior to the years 1909 to 1911, neither the Secretary of the Interior nor any authorized representative of the Secretary, acting in the exercise of the authority reserved under the executive order, expressly or by implication, settled the Navajo Indian Tribe or any individual Navajo Indians anywhere in the 1882 reservation.

5. In the years 1909 to 1911, the Secretary of the Interior, acting through his authorized representative, impliedly settled in the 1882 reservation about three hundred individual Navajo Indians who then resided in the reservation and intended to remain therein, and who had agreed to accept allotments therein of land not then being used or occupied by Hopi Indians, but since these Navajo Indians are unidentified in this record, and since it is not established in this record that any of these three hundred Navajo Indians or their descendants, also unidentified, were residing in the 1882 reservation on July 22, 1958, the settlement of such Indians in 1909-1911, created no rights of use and occupancy which are cognizable in this suit.

6. Except for Navajo Indians, if any, who may have been settled in the years 1909-1911 in that part of the 1882 reservation

referred to in this paragraph, and whose rights in any event are not now cognizable, neither the Secretary of the Interior nor any authorized representative of the Secretary, acting in the exercise of the authority reserved under the Executive Order of December 16, 1882, ever expressly or by implication settled the Navajo Indian Tribe or any individual Navajo Indians in land management district 6 of the 1882 reservation, as such district was defined on April 24, 1943, such district being described in paragraph 41 of the findings of fact herein.

7. Beginning on February 7, 1931, and continuing to July 22, 1958, all Navajo Indians who entered that part of the 1882 reservation lying outside of district 6, as defined on April 24, 1943, for purposes of permanent residence, were impliedly settled therein by the Secretary of the Interior or his authorized representative at or shortly after the time of entry, and on July 22, 1958, all Navajo Indians then residing in the indicated part of the 1882 reservation were accordingly settled therein pursuant to the Executive Order of December 16, 1882.

8. Beginning on June 2, 1937, the Navajo Indian Tribe, for the common use and benefit of the Navajo Indians, was impliedly settled in that part of the 1882 reservation lying outside of district 6, as defined on April 24, 1943, pursuant to the valid exercise of the authority conferred in the Secretary by the Executive Order of December 16, 1882.

9. No Indians or Indian tribes other than Navajos were ever settled in the 1882 reservation pursuant to the authority vested in the Secretary of the Interior under the Executive Order of December 16, 1882, and no Indians or Indian tribes other than Hopis and Navajos have any right or interest in the 1882 reservation.

10. On July 22, 1958, the Hopi Indian Tribe, for the common use and benefit of the Hopi Indians, had the exclusive interest in and to that part of the 1882 reservation lying inside district 6, as defined on April 24, 1943, subject to the trust title of the United States, and pursuant to section 2 of the Act of July 22, 1958, such area is accordingly a reservation for the Hopi Indian Tribe.

11. The rights of the Hopi Indian Tribe, acquired on December 16, 1882, under the executive order of that date, to use and occupy the entire 1882 reservation for and on behalf of the

Hopi Indians, were never terminated by Congressional enactment, administrative action, or abandonment, but after February 7, 1931, the Hopi Indian Tribe was validly required to share equally with settled Navajo Indians and, after June 2, 1937, with the settled Navajo Indian Tribe, the use and occupancy of that part of the reservation in which individual Navajos and the Navajo Indian Tribe were validly settled.

12. The virtual exclusion of Hopi Indians, accomplished by administrative action extending from 1937 to 1958, from use and occupancy, for purposes of residence and grazing, of that part of the 1882 reservation lying outside of district 6, as defined on April 24, 1943, has at all times been illegal.

13. Neither the Navajo Indian Tribe nor any individual Navajo Indians have the exclusive interest in and to any part of the 1882 reservation.

14. The Hopi Indian Tribe and the Navajo Indian Tribe, for the common use and benefit of their respective members, but subject to the trust title of the United States, have joint, undivided, and equal interests both as to the surface and subsurface, including all resources, in and to that part of the reservation lying outside of land management district 6, as defined on April 24, 1943, and described in paragraph 31 of the findings of fact herein.

15. The quieting of title in and to the lands within the 1882 reservation, in the Hopi and Navajo Indian Tribes, in accordance with the conclusions of law stated above will be just and fair in law and equity.

FREDERICK G. HAMLEY, Circuit Judge,
LEON R. YANKWICH, District Judge,
JAMES A. WALSH, District Judge.

September 28, 1962

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

DEWEY HEALING, CHAIRMAN OF THE HOPI TRIBAL COUNCIL OF THE HOPI INDIAN TRIBE, FOR AND ON BEHALF OF THE HOPI INDIAN TRIBE, INCLUDING ALL VILLAGES AND CLANS THEREOF, AND ON BEHALF OF ANY AND ALL HOPI INDIANS CLAIMING ANY INTEREST IN THE LANDS DESCRIBED IN THE EXECUTIVE ORDER DATED DECEMBER 16, 1882,

Plaintiff,

vs.

PAUL JONES, CHAIRMAN OF THE NAVAJO TRIBAL COUNCIL OF THE NAVAJO INDIAN TRIBE FOR AND ON BEHALF OF THE NAVAJO INDIAN TRIBE, INCLUDING ALL VILLAGES AND CLANS THEREOF, AND ON BEHALF OF ANY AND ALL NAVAJO INDIANS CLAIMING ANY INTEREST IN THE LANDS DESCRIBED IN THE EXECUTIVE ORDER DATED DECEMBER 16, 1882; ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, ON BEHALF OF THE UNITED STATES,

Defendants.

No. Civil 579 Prescott

JUDGMENT

This cause having been submitted to the court on August 2, 1961, following trial, oral argument, and the filing of proposed findings of fact, objections thereto, and briefs, and the court having made and entered its findings of fact and conclusions of law, now therefore it is hereby declared, adjudged and decreed that:

1. The Hopi Indian Tribe, for the common use and benefit of the Hopi Indians, but subject to the trust title of the United States, has the exclusive right and interest, both as to the surface and subsurface, including all resources, in and to that part of the executive order reservation of December 16, 1882, lying within

land management district 6, as defined on April 24, 1943, the said district 6 being described as follows:

Starting at the section corner between Sections 3 and 4, Township 28 North and Range 14 East. This corner is located 24.75 chains due South and then 54.35 chains due West from Windmill M-174. The corner is steel and is located on the West bank of the Dinehbito Wash. It is located a few chains West of the wash. The boundary runs South of this corner to the center of the wash which distance is about 2 chains. From the above mentioned corner the boundary runs North 25° 10' West to Howell Mesa escarpment in Section 20, Township 29 North, Range 14 East. It then goes in a northerly direction along said escarpment until the Tuba City-Hotevilla road is intersected in the South half of Section 28, Township 30 North, Range 14 East. The boundary then follows the road until it reaches the center of the Dinehbito Wash about on the section corner common to Sections 22, 23, 26 and 27, Township 30 North, Range 15 East. The boundary then follows the center of the Dinehbito Wash in a northeasterly direction until it interserts a line going North 45° West from the quarter corner between Sections 17 and 20, Township 30 North and Range 16 East. This line is approximately 43 chains long. The boundary then follows said line Southeast to the quarter corner between Sections 17 and 20, Township 30 North, Range 16 East. The boundary then follows the section line due East from the said quarter corner for 4.5 miles to the section corner common to Sections 13 and 24, Township 30 North, Range 16 E, and Sections 18 and 19, Township 30 North, Range 17 East, then turns an angle and goes North 42° East for a distance of approximately 2.2 miles until the escarpment on the East side of the valley is encountered in the NW¼ of Section 8, Township 30 North, Range 17 East. The boundary then follows this escarpment in a southerly direction until the most southerly point in the escarpment is reached in the E/2 of Section 16, Township 30 North, Range 17 East. The boundary then goes .4 miles South 23° East at whicl. point it reaches the Oraibi Wash in the NW¼, Section 22, Township 30 North, Range 17 East. The boundary then follows the West bank of the Oraibi Wash in a northeasterly direction until a point 200 yards above the

Hardrocks-Diversion Dam is reached. The boundary then turns an angle and follows a line South 57° 30' East for a distance of approximately five miles until it reaches the buck pasture fence in the SW^1_4, Section 15, Township 30 North, Range 18 East.

The boundary then follows the buck pasture fence Southwesterly for approximately .4 miles in the NW^1_4, Section 22, Township 30 North, Range 18 East. Thence Southeasterly along the buck pasture fence for approximately .4 mile in the NW^1_4, Section 22, Township 30 North, Range 18 East. Thence Northeasterly along the buck pasture fence for approximately 3 miles to a point in the NW^1_4, Section 18, Township 30 North, Range 19 East. Then Southeasterly along the buck pasture fence for approximately 1 mile to the SE^1_4, Section 18, Township 30 North, Range 19 East. Thence Northeasterly along the buck pasture fence approximately .2 mile to the point on the section line between the SW quarters of Sections 17 and 18, Township 30 North, Range 19 East. Then South 76° 30' East following the Existing Boundary fence to a point 1,879 feet due North of Section corner between Sections 23, 24, 25, and 26, Township 30 North, Range 19 East. This section corner is located near water well H 14 which is known as Cat Springs. Then South 54° 15' East following the Existing Boundary fence to a point in Bingham's Lake approximately 8 miles South of Latitude 36° 00' and 4.25 miles West of Longitude 110° 00'.

From this point in Bingham's Lake the boundary then runs South 38° 00' West following the Existing Boundary fence until it intersects the Jeddito Wash. The intersection takes place at the same point as Longitude 110° 15' intersects the wash. The boundary then follows the center of the wash to the point where the Township line between Townships 24 and 25 North intersects the wash. The boundary then follows the Township line due West following the Existing Boundary fence for 2.3 miles at which point it goes North 45° 57' West following the Existing Boundary fence for approximately 25.6 miles until it intersects the Dinehbito Wash at the same point as the Township line between Townships 27 and 28 North. The boundary then follows the center of the Wash 8 miles up to the point where it intersects the line running

due South of the corner between Sections 3 and 4 Township 28 North, Range 14 East.

2. Title in and to the part of the 1882 reservation described in the preceding paragraph of this judgment is quieted in the Hopi Indian Tribe for the common use and benefit of the Hopi Indians, subject to the trust title of the United States, and such land is henceforth a reservation for the Hopi Indian Tribe.

3. The Hopi Indian Tribe and the Navajo Indian Tribe, for the common use and benefit of their respective members, but subject to the trust title of the United States, have joint, undivided and equal rights and interests both as to the surface and subsurface, including all resources, in and to all of the executive order reservation of December 16, 1882, lying outside of the boundaries of land management district 6, as defined on April 24, 1943, such boundaries being described in paragraph 1 of this judgment, and title in and to all of that reservation except the described district 6, is accordingly quieted in the Hopi Indian Tribe and the Navajo Indian Tribe, share and share alike, subject to the trust title of the United States, as a reservation.

4. No Indians or Indian tribes other than Hopis and Navajos have any right or interest in and to any part of the executive order reservation of December 16, 1882.

FREDERICK G. HAMLEY, Circuit Judge,
LEON R. YANKWICH, District Judge,
JAMES A. WALSH, District Judge.

September 28, 1962

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IN THE SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1962

PAUL JONES, CHAIRMAN OF THE NAVAJO TRIBAL COUNCIL OF THE NAVAJO INDIAN TRIBE, ETC.,

Appellant,

v.

DEWEY HEALING, CHAIRMAN OF THE HOPI TRIBAL COUNCIL OF THE HOPI INDIAN TRIBE, ETC., AND ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, ON BEHALF OF THE UNITED STATES,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

MOTION TO AFFIRM

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MOTION TO AFFIRM

Appellee, Dewey Healing, moves that the final judgment of the District Court be affirmed, insofar as the questions raised by appellant are concerned, on the ground that it is manifest that the questions raised by appellant on which the decision of the cause depends are so unsubstantial as not to need further argument.

QUESTIONS PRESENTED

1. Stripped of its narration and argument the first question raised by appellant is, did the Court err

in decreeing that the Navajo had a joint interest with the Hopi rather than an exclusive interest in those areas of the Executive Order Reservation in which the Court found the Navajo had been settled by the Secretary of the Interior.

2. The second question is prefaced in appellant's Jurisdictional Statement by two erroneous assertions. First, the Court did not find, as contended by appellant, that the Navajo were settled by the Secretary, "on all portions of the 1882 Executive Order Area not occupied by Hopis."(1) Second, contrary to the assertions of appellant, *no line of authorized Hopi use and occupancy* was ever established by the Secretary. Only an adjustment in a grazing district line was made.(2) The second question presented by appellant is, "Whether, after the Secretary of the Interior had settled the Navajos on certain lands in 1931, he had authority thereafter, in 1936 and 1943, to unsettle them *pro tanto*."

STATEMENT

This is a direct appeal on behalf of the Navajo Tribe from the final judgment and decree entered on September 28, 1960, by a district court of three judges specially constituted pursuant to Section 1 of the Act of July 22, 1958, 72 Stat. 403.(3)

The suit was commenced on behalf of the Hopi Indian Tribe to quiet title to the lands comprising the Executive Order Reservation of December 16, 1882, which lands were withdrawn from settlement and

(1) Findings of Fact 36-40, pgs. 216, 217
(2) Finding of Fact 48, pg. 211
(3) Opinion of the District Court, pgs. 2, 3

sale and set apart *for the use and occupancy of the Moqui* (Hopi), and "such other Indians as the Secretary of the Interior may see fit to settle thereon."[4] Other than the Hopi, only the Navajo Tribe asserted any interest in the reservation.

By its judgment the court below decreed that the Hopi Indian Tribe has the exclusive right and interest in and to that part of the Executive Order Reservation lying within Land Management District 6, as defined on April 24, 1943, and that the Hopi Indian Tribe and the Navajo Indian Tribe have joint, undivided and equal rights and interests both as to surface and subsurface, including all resources, in and to all of the Executive Order Reservation lying outside of Land Management District 6. Title to said lands outside of district 6 was accordingly quieted in the two tribes as a reservation, share and share alike.[5]

In his Jurisdictional Statement, appellant seeks to have this Court review that part of the judgment which

(1) Decreed a joint, undivided and equal interest to the Hopi Indian Tribe in lands outside of Land Management District 6, and

(2) Decreed in the Hopi Indian Tribe an exclusive interest in certain lands within District 6 upon which it is claimed that Navajo

(4) Opinion of the District Court, pg. 2
(5) Judgment of District Court, pgs. 225-228, inclusive.

Indians had once been settled by the Secretary of the Interior.[6]

The questions as raised by appellant fall in the category of determining whether the trial court erred in so decreeing. In support thereof appellant sets forth in his Jurisdictional Statement certain data which he describes as being a "drastic compression" of a long opinion and record into "simply the essentials necessary to an understanding of the questions raised . . ." (J.S. pg. 6)

The Jurisdictional Statement is so partisan in its design that supplementation and correction are essential to a fair presentation of the case. In the interest of brevity and specificity we hereinafter set out, in italics, some of the quotations from appellant's "Statement" to which we object and in each case follow with our own observation and references to the record:

> *1. "As originally recommended by the Hopi agent in the field, an area of land for the exclusive use of the Hopis was in contemplation (Op. 116-118, 120); the 'and such other Indians' clause was added by the Commissioner of Indian Affairs in Washington before submission to and signature by the President (Op. 118)." (J.S. pg. 6)*

In answer thereto we cite from the opinion of the Court:

"This was a customary provision in execu-

(6) A separate appeal, numbered 1050 in the Supreme Court of the United States, filed by the Hopi Indian Tribe relates to the questions as to whether the Secretary of the Interior had authority to settle Navajo Indians and the Navajo Indian Tribe upon any part of the Executive Order Reservation and whether the Navajo, having a reservation of their own, can also share in the Hopi Executive Order Reservation.

tive orders of that period. In 1 Ex. Order 195, I Kappler 916, dated April 9, 1872, a reservation was set aside for named bands of Indians in Washington Territory, 'and for such other Indians as the Dept. of Interior may see fit to locate thereon.' Between that date and December 16, 1882, as shown by plaintiff's exhibit No. 263, nine additional orders, setting aside reservations for named Indian tribes, contained a similar provision.

"On the other hand, when it was decided to give immediate reservation rights to specific Indians then residing in the area, in addition to the named Indians for whom the reservation was principally created, officials know how to make this clear in an executive order. Just four days prior to the issuance of the order of December 16, 1882, an executive order was issued establishing the Gila Bend reservation. It was therein recited that the reservation was created for the '. . . Papago *and other Indians now settled there*, and such other Indians as the Secretary of the Interior may see fit to settle thereon.' (Emphasis supplied.)"[7]

2. *"In the period just following 1882, the Indian Office invoked military force to expel the Navajos from that portion of the Executive Order used and occupied by the Hopis, (Op. 123-129)." (J.S. pg. 6)*

The requested expulsion was to have been from the entire Hopi reservation, as shown by the letter of the Secretary of the Interior to the Secretary of War in 1888, which stated:

"The reservation of Moquis Indians was set apart by Executive Order of October[8] 16, 1882, for them, and such other Indians as the Secretary of the Interior may see fit to settle thereon. It comprises no land set apart for the

(7) Opinion of the District Court, pgs. 19, 20
(8) "October" should be December. This was an error by the writer of the letter.

Navajos, and no Navajos have been settled thereon by the Department, nor have they any right to drive or graze their flocks and herds over the Moqui lands.

". . . I therefore have the honor to request that you will give the necessary orders for the movement of a company of troops or such other force as may be deemed necessary for the purpose, under the command of a judicious, discreet, and firm officer with instructions to visit the Moqui reservation and also the Navajo reservation and especially those portions of each lying adjacent the one to the other, and to remove all Navajo Indians found trespassing with their herds and flocks on the Moqui reservation and to notify them that their depredations must cease and that they must keep within their own reservation."[9]

3. "Actually, although troops were called out in 1888 and in 1890 (Op. 123-126, 128-219), the Army opposed the removal of the Navajos who were settled within the executive Order Area, not only because of hardship to them in winter, but in any event not unless and until a line of separation was established between the Hopis and the Navajos to settle for the future the respective lands to be used and occupied by the members of each tribe (Op. 124-126, 128-130)." (J.S. pgs. 6, 7)

In truth, the army captain stated that *until the boundary line between the Navaho and Hopi Reservation* was distinctly marked, only persuasive measures would be used towards the Navaho in this regard.[10]

4. "Moreover, at no time did any of the Army's efforts contemplate expulsion of Navajos from the entire 1882 Executive Order Area, but only from the limited portion thereof used and occupied by the Hopis (p. 123-130)." (J.S., pg. 7)

(9) Pl. Ex. 19, Vol. 1, pg. 65, Extracts from Pl. Ex.

(10) Chronological Account of District Court, pg. 129

The Secretary of War on October 13, 1888, wrote the Secretary of the Interior referring to the latter's request, as hereinbefore set out, and stated:

> "In reply I beg to advise you that your letter with its enclosures has been referred to Major General Commanding the Army, with instructions to take action in accordance with your request."(11)

In the chronological account at page 124, the trial court said:

> "The result was that, on November 15, 1888, Col. E. A. Carr, commanding officer at Fort Wingate, New Mexico, received orders from the Adjutant General, Department of Arizona. These orders were to send an expedition to the reservation area with instructions to prevent Navajo trespassing and keep them within *their own reservation*. Col. Carr telegraphed the Adjutant General that, in compliance with these orders, Capt. Com. M. Wallace and fifty men, infantry, cavalry and scouts, would be sent on the expedition." (Emphasis ours)

On page 130 the court further stated

> "It was his (General McCook's) view that the line of demarcation *between the Navajo and Hopi reservations* be distinctly marked by indestructible monuments and that the water in the neighborhood of the line and lying east thereof be reserved for the Navajos, and that to the west for the Hopis. General McCook stated that, until this is done it would not be wise to use force to prevent the Navajos from grazing near the Hopi reservation." (Emphasis ours)

5. *"The last suggestions emanating from the Indian Office that any of the Navajos living there were trespassers came in 1899 and 1900 (Op. 135-136)." (J.S. pgs. 7, 8)*

An example of the inaccuracy of this statement

(11) Pl. Ex. 20, Vol. 1, pg. 67, Extracts from Pl. Ex.

is found in the Fifty-Third Annual Report of the Board of Indian Commissioners to the Secretary of the Interior, 1922, which contained the following:

> "There is no doubt that the majority of these (Navajo Indians) on the Moqui Reservation have come in from all sides with a deliberate purpose of taking the grazing land which rightfully belongs to the Hopi."[12]

6. "In 1893 attempts were made to allot lands therein to individuals, but the plan was abandoned in the face of Hopi preference for communal ownership (Op. 134)." (J.S., pg. 8)

Appellant omits reference to the fact that the Commissioner of Indian Affairs directed that no person should be allowed an allotment unless the father or mother was a recognized Moqui Indian and that no allotments were to be made to Indians other than Moquis except by express authority of the Office of the Commissioner.[13]

7. "In 1909 there was a second effort to allot ands to each Indian residing in the Executive Order Area, irrespective of whether the allottee was a Hopi or a Navajo. (Op. 138)" (J.S. pg. 8)

Appellant omits from his statement the fact that the same letter authorizing Navajo allotment instructed Agent Murphy that if the Navajo declined to accept allotments in the Moqui Reservation of the areas specified, they could be removed from the reservation,[14] and that he was further instructed that such Navajo allottees "must be required to choose the reservation on which they will take *all* their lands. They cannot

(12) Pl. Ex. 251, Vol. II, pg. 262, Extracts from Pl. Ex.
(13) Pl. Ex. 35, Vol. I, pg. 118, Extracts from Pl. Ex.
(14) Pl. Ex. 119, Vol. II, pg. 164, Extracts from Pl. Ex.

be permitted to take part of their allotment on the Moqui Reservation, with the understanding they will be given the remainder on the Navajo, or Navajo Extension Reservation."[15]

Space limitations do not permit further detailed analysis of all of appellant's "Statement". However, we direct the court's attention to the fact that the district court having found there was no "settlement" of Navajo Indians prior to 1931,[16] appellant's repeated use of the term "settled" is not to be taken in the sense of Secretarial settlement as contemplated by the Executive Order.

In addition to the foregoing it should be noted that appellant has omitted from his "Statement" such "simple essentials" as the following:

a. The Executive Order Reservation of 1882 was created for the Hopi Indians for the purposes, among others, of reserving to the Hopi sufficient living space against advancing Navajo, to minimize Navajo depredations against the Hopi,[17] and its establishment followed long years of repeated complaints concerning Navajo aggression against the Hopi.[18]

b. None of the twenty-one Secretaries of the Interior who served from December 16, 1882, to July

(15) Pl. Ex. 123, Vol. II, pg. 471, Extracts from Pl. Ex.
(16) Finding of Fact 35, pg. 216
(17) Finding of Fact 16, pg. 212
(18) Pl. Ex. 6, Vol. I, Extracts from Pl. Ex., pg. 33
Pl. Ex. 7, Vol. I, Extracts from Pl. Ex., pg. 35
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Pl. Ex. 10, Vol. I, Extracts from Pl. Ex., pg. 42
Pl. Ex. 153, Vol. I, Extracts from Pl. Ex., pg. 125
Pl. Ex. 268, Vol. I, Extracts from Pl. Ex., pg. 126

22, 1958, or any authorized representative, ever expressly ordered, ruled or announced, orally or in writing, that pursuant to the discretionary power vested in him under the executive order he had "settled" any Navajo in the 1882 reservation, or had authorized, any Navajo to begin, or continue, the use and occupancy of the reservation for residential purposes.[19] (Notwithstanding this, appellant states that the court held that all of the Navajo on the reservation had been settled thereon by the Secretary, either impliedly or *expressly*. (J.S., pg 12.))

c. Prior to February 7, 1931, no Secretary of the Interior nor any authorized representative, expressly or by implication, authorized the Navajo Indian Tribe or any Navajo Indians, whether living within the reservation or not, to use and occupy any part of the reservation for residential purposes.[20]

d. The Navajo by trespass and sheer weight of numbers took over approximately four-fifths of the Hopi Reservation, interferring with Hopi uses therein for grazing, farming, gathering wood, fuel, food, plants, dyes, materials, evergreens for ceremonial purposes, and for hunting.[21]

e. The Hopi were repeatedly assured by the Commissioner of Indian Affairs that the establishment of Land Management District 6 as a grazing district was not a delineation of a reservation boundary

(19) Finding of Fact 21, pg. 213

(20) Finding of Fact 35, pg. 216. For minor exception noted therein see Finding of Fact 27, pg. 215

(21) Opinion of the District Court, pg. 93; Findings of Fact 44, 49, pgs. 220-221

for the Hopi Tribe;[22] that the creation of District 6 was not a finding as to what area the Hopi should occupy;[23] and that their exclusion from all but District 6 was not intended to prejudice the merits of the Hopi claims.[24] These assurances were all confirmed in 1945 by the Commissioner of Indian Affairs in a letter to Senator Burton K. Wheeler, which stated:

> "In order to protect the Hopis against additional encroachment by Navajo livestock upon the Hopi range, certain limits were established beyond which Navajo livestock would not be allowed to graze. This was in no sense an establishment of boundary lines of the Hopi Reservation. Those boundary lines still are the lines of the Executive Order Reservation . . . They have been assured several times that these fences do not establish any boundary line for the Hopi Reservation and that no new delimitation of the reservation boundaries is intended."[25]

ARGUMENT

The first question raised by appellant as to whether the court erred in decreeing that the Navajo did not have an exclusive interest in the areas of the reservation in which the court found the Navajo had been settled by the Secretary of the Interior is not substantial because the District court was so manifestly right in its determination of this question. The Executive Order of December 16, 1882 established the reservation "for the use and occupancy of the Moqui, (Hopi) and such other Indians as the Secre-

(22) Chronological Account of District Court, pgs. 176, 177
(23) Chronological Account of District Court, pg. 181
(24) Findings of Fact 48, 50, pg. 221
(25) Pl. Ex. 231, Vol. III, pg. 429, Extracts from Pl. Ex.

tary of the Interior may see fit to settle thereon."[26]

The court in its opinion stated,

> "In the quoted clause the 'Moqui' Indians are specifically named, a comma appears after the word, 'Moqui', and there is no comma after the word 'Indians'. This specific reference to the Hopis, and the punctuation, indicate that the words 'as the Secretary may see fit to settle thereon,' do not apply to the Hopi Indians, but only to 'such other Indians'. Under this construction the Hopis would appear to have acquired immediate rights and interest in and to the 1882 reservation, without the need of any Secretarial action permitting them to 'settle' on the reservation."[27]

The Hopi reservation was confirmed by the Act of July 22, 1958.[28]

The appellant's use of the phrases "egregious error", "obvious misreading" and "demonstrably inadmissible construction" does not explain how he contends the Navajo ever received the whole interest in part of the reservation to the exclusion of the Hopi. The Secretary was given discretion as to whether he would settle any other Indians upon the reservation. The court not only held that the Secretary intended to limit the area upon which he settled Navajo Indians, but the court also held, as the Solicitor of the Department of the Interior had previously held,[29] that,

> "The virtual exclusion of Hopi Indians, accomplished by administrative action extending from 1937 to 1958, from use and occupancy,

(26) Opinion of the District Court, pg. 2
(27) Opinion of the District Court, pg. 9
(28) Opinion of the District Court, pgs. 2, 3
(29) Sol. Opinion (Margold) Feb. 12, 1941

> for purposes of residence and grazing, of that part of the 1882 reservation lying outside of district 6, as defined on April 24, 1943, has at all times been illegal."[30]

This holding is supported by more than a "Hopi fixation". (J.S. pg. 16) It is founded upon the Executive Order, a presidential recognition of centuries old Hopi rights, confirmed by Congress.

The Act of July 22, 1958 did provide that,

> "Lands, if any, in which the Navaho Tribe or individual Navaho Indians are determined by the court to have the exclusive interest shall thereafter be a part of the Navaho Indian Reservation:"[31]

But aside from the congressional grant to the Hopi of the lands described in the Executive Order, the court found and concluded, upon competent and substantial evidence that neither the Navajo Tribe nor any Navajo Indians had any exclusive interest in the area outside of district 6, and further determined that during the years the Hopi Indians have continuously made use of a large part of that area for the purpose of cutting and gathering wood, obtaining coal, gathering of plants and plant products, visiting ceremonial shrines, hunting and also for limited grazing and residential purposes.[32]

Appellant argues that by the Act of July 22, 1958 Congress directed that the reservation be divided. It did no such thing. It did no more than recognize that

(30) Conclusion of Law 12, pg. 224
(31) Opinion of the District Court, pg. 3
(32) Finding of Fact 44, pg. 220, Conclusion of Law 13, pg. 224

a controversy existed. Anticipating that the court might find areas in which neither tribe had an exclusive interest,[33] Congress provided that the two tribes could "sell, buy or exchange any lands within their reservation". Appellant also contends that Congress intended that this controversy should ultimately be determined by the Supreme Court. In providing for direct appeal Congress certainly intended that this court review this case only if an appellant could meet the established requirements of this court for review on appeal.

Appellant seeks to avoid the congressional limitations placed upon the President and the Secretary of the Interior with respect to Indian reservations. This he attempts to do by improper references to selected excerpts from the legislative history of the Acts of May 5, 1918,[34] and March 3 1927,[35] in contradiction of the clear and unambiguous provisions of the Acts. Such references have been repeatedly forbidden by the decisions of this court in the absence of ambiguity.[36] But even if we carefully examine the legislative proceedings, by what "strained processes of deduction"[36] can we conclude that one reason spoken into the record excludes all other reasons for enactment of a statute that is clear and obvious in its prohibitions.

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(33) Opinion of the District Court, pgs. 101-104, & foot note 94 thereto.

(34) J.S. pg. 5

(35) J.S. pg. 5

(36) Gemsco Inc. v. Walling, 65 S. Ct. 594, 324 U.S. 244, 89 L.Ed. 921
Ex Parte Joseph Collett, 69 S. Ct. 944, 959, 337 U.S. 55, 93 L.Ed. 1207

We suspect that appellant's dissatisfaction with the joint tenancy provisions of the judgment is not because of impractical administration. The sustaining of the Hopi position on its separate appeal (No. 1050) would solve that problem. We must both admit that the narrowing of the controversy by decreeing the rights of both tribes gives basis for a voluntary partition. The Navajo Tribe will never be satisfied unless the court completely recognizes its conquest, by aggression and encroachment, of four-fifths of the reservation originally established principally for the purpose of protecting the Hopi against the constant depredations and pressure of the Navajo.

The second question presented by appellant as to "whether, after the Secretary of the Interior had settled the Navajo on certain lands in 1931, he had authority thereafter, in 1936 and 1943 to unsettle them *pro tanto*," assumes facts not in the record. The trial court held that the limitation upon the area of Navajo settlement was not administratively fixed by the establishment of final and exact boundary lines until April 24, 1943.[37] The suggested 1931 line was never intended as a final line, and it was expressly recognized that future conditions might warrant changing such line.[38] The 1936 line was only tentative.[39] Appellant's argument on the question assumes that once a Navajo has set foot on new soil it becomes his exclusively. (This attitude is not without precedent in Navajo history.) Since appellant cites no author-

(37) Finding of Fact 40, pg. 217
(38) Opinion of District Court, pgs. 71, 72
(39) Opinion of District Court, pg. 72

ity in support of his argument, it is difficult to discover the legal principle, if any, upon which he relies.

Appellant's contention is anchored in the proposition that all ground yielded by the Hopi under Navajo pressure, for which Secretarial consent is implied, becomes irrevocably Navajo, and that thereafter the Secretary is powerless to do anything about it. Can the Secretary as appellant contends, take two million acres of Hopi lands and give them to the Navajo, but be powerless to take one acre from the Navajo and return it to the Hopi? An affirmative answer is so plainly wrong, unfair and unjust that the unsubstantial nature of appellant's second question becomes clearly manifest.

Neither the persistency of a controversy for a period of over 80 years, nor the quasi-sovereign status of a litigant dispenses with the merit necessary to justify review. We do not argue against full consideration of the case, but we do argue the lack of substantial questions raised by appellant. The trial was marked by judicial patience and meticulous inquiry. It is appreciated that this Honorable Court has a weighty and important responsibility to determine whether questions are substantial, but in so doing the finality of its decision that they are not may bring abrupt end to contention.

CONCLUSION

We respectfully submit, therefore, that the appellant presents no substantial question for the decision of this Court, and that the judgment of the District Court should be affirmed insofar as the questions raised by appellant are concerned.

Respectfully submitted,

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Appeal from the United States District Court for the District of Arizona

BRIEF IN OPPOSITION TO THE HOPIS' MOTION TO AFFIRM

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Appeal from the United States District Court for the District of Arizona

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BRIEF IN OPPOSITION TO THE HOPIS' MOTION TO AFFIRM

Pursuant to Rule 16(3), appellant files this brief in opposition to the Hopis' Motion to Affirm, hereinafter "M/A."

That motion, stripped of its *ad homines* references to "Navajo depredations" (M/A 9), "Navajo aggression"

(*ibid.*), "trespass and sheer weight of numbers" (M/A 10), "aggression and encroachment" and "constant depredations and pressure" (M/A 15), stripped also of its allegations that facts have been misstated, most of which do not call for present resolution or even contradiction, actually serves to establish, not that this appeal by the Navajos should be disposed of without any hearing, but rather that the issues tendered by the Navajos involve questions of genuine substance.

First. The Navajos' first question on appeal is whether they were entitled to an exclusive interest in those non-Hopi portions of the 1882 Executive Order Area where they had been settled by the Secretary, or whether, as the court below held, they were entitled in those portions only to "joint, undivided and equal rights and interests both as to the surface and subsurface" together with the Hopis.

1. At the heart of this question is the Executive Order itself, which set apart the area "for the use and occupancy of the Moqui,[1] and such other Indians as the Secretary of the Interior may see fit to settle thereon." We said (J.S. 6) that, "As originally recommended by the Hopi agent in the field, an area of land for the exclusive use of the Hopis was in contemplation (Op. 116-118, 120); the 'and such other Indians' clause was added by the Commissioner of Indian Affairs in Washington before submission to and signature by the President (Op. 118)."

We confess ourselves at a loss to understand why that simple statement of fact, which is fully supported by the references cited, can properly be objected to by the Hopis (M/A 4-5), or on what basis an area thus created can correctly be referred to as the "Hopi Executive Order Reservation" (see the terms of the Hopis' cross-appeal as set forth at J.S. 22-23; see also J.S., No. 1050, p. 3), in

[1] "The words 'Moqui' and 'Hopi' refer to one and the same Indian people." Fdg. 9, Op. 210.

the face of the executory interest that the Executive Order conveyed to any and all other Indians who might be settled in the area by the Secretary. Throughout, as must even now be apparent, the thrust of the Hopi argument ignores the "and such other Indians" clause as though it were a bad dream that would somehow disappear if only it were repeatedly passed by without mention.

2. It is not now necessary to consider whether any Navajos were settled by the Secretary in the 1882 Executive Order Area prior to 1931; for present purposes it is quite sufficient that, as the court below held and found (Op. 46, 162, 216), they were so settled in 1931.[2] On that footing, the question is whether this settlement gave the "such other Indians," i.e., the Navajos, only a joint tenancy with the Hopis in respect of the Navajo portion, leaving the Hopis with exclusive rights in the rest; or whether the Navajos as the only other tribe later settled in the area under the terms of the Executive Order became entitled to equality with the Hopis, so that each was entitled to exclusive use and occupancy in its respective portion of the Executive Order Area. The court below espoused the former alternative, which the Navajos for reasons already set forth (J.S. 15-21) deem entirely erroneous. These are obviously matters too weighty to be disposed of on motion.

3. It is the Hopis' position that the Secretary by 1931 was no longer empowered to settle any Navajos in the Executive Order Area because of the supposed prohibition in the Acts of 1918 and 1927 (J.S. 5; J.S., No. 1050, pp. 14-15), which forbade the creation of, additions to, or

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[2] Finding 21 (Op. 213), summarized at M/A 9-10, must be read in the light of Fdg. 36 (Op. 216), which in pertinent part says: "This 1931 blanket and all-inclusive recognition of Navajo rights of use and occupancy is explainable on no other basis than that the Secretary, impliedly exercising the authority reserved to him in the executive order, was then and there settling in the 1882 reservation all Navajos then residing in that reservation."

changes in the boundaries of Executive Order Indian reservations. See J.S. 22-23; J.S., No. 1050, p. 3.

We have shown (J.S. 18-21) that these statutes, which are certainly not precise or crystal clear on their face, were intended to prevent further Executive Order withdrawals of public lands for Indian use with the consequent removal of such lands from State taxation. To this demonstration the Hopis answer (M/A 14) that the provisions of the Acts are "clear and unambiguous," that we have made "improper references to selected excerpts from the legislative history," and that we have resorted to "strained processes of deduction."

Significantly enough, the Hopis do not adduce any relevant passages from the legislative history not cited or quoted by us; and we are confident that none are available. What this legislation involved was a floor amendment, actuated by a single motive duly expressed by its sponsor; this amendment added a proviso which is far from clear on its face; and the remarks of its sponsor and of those like-minded make it perfectly clear that the supposed absolute prohibition had nothing whatever to do with the power of the Secretary to divide an existing Executive Order Area among the several Indian tribes for whom it had originally been set aside, and which, in consequence of being thus set aside, had already been withdrawn from local taxation many years before.

We can understand the Hopis' unhappiness over the shattering of the 20-year old myth regarding the scope of the 1918 and 1927 Acts that had hitherto so strongly supported their contention—and that had for so long prevented a resolution of the present controversy. But we submit with confidence that the legislative history we presented was alike accurate, complete, and competent.

It seems sufficient therefore to remark that not only the Navajos' first question here but also the subsidiary questions necessarily involved therein plainly qualify as issues

of substance; that even at first blush the rulings below on those issues are shown to be probably wrong; that on further examination those rulings will be shown to be clearly wrong; and that the case is accordingly inappropriate for adjudication on the appeal papers.

Second. The Navajos' second question on this appeal concerns the power of the Secretary to unsettle them within the Executive Order Area after he had once settled them therein; specifically whether, after approval of the first Hagerman report (J.S. 8-9, and references there cited), the Secretary thereafter had power, in 1936 by creation of Land Management District No. 6, and again in 1943 by revision of that District's boundaries, to expel and dispossess many Navajo families (J.S. 9-11, and references there cited).

Although the court below said of earlier action looking to remove Navajos from the Executive Order Area, "They could not have been removed if they had been settled in the reservation by Secretarial authority" (Op. 31), none the less its final judgment gave effect to the removals effected in 1943, where, in the course of extending the boundaries of District 6 for the Hopis' benefits, a large number of Navajos were heartlessly uprooted (Op. 61-62, 195).

The Hopis argue that the 1931 line was never intended to be final, and that the 1936 line was only tentative (M/A 15). We disagree; but in any event we would urge alternatively that even if the Secretary had been free to alter the 1931 line, he was not empowered in the process to dispossess and unsettle any Navajos whom he had once duly settled. But, on either basis, we submit it is clear that the extent and indeed the very existence of the Secretary's power to unsettle in 1936 and 1943 Indians whom he duly settled in 1931 present issues of substance that require full presentation and plenary consideration of the conflicting contentions on both sides.

Third. The Hopis ask the Court to hear argument on their contention (J.S., No. 1050, Question 1) that the Secretary of the Interior had no power to settle any Navajos in the Executive Order Area in 1931, while simultaneously asking for summary affirmance of the Navajos' appeal, which poses questions concerning the consequences of such a settlement, and the Secretary's power to effect a subsequent unsettlement. Thus the Hopis say that while the existence of the Secretary's power to settle the Navajos presents a substantial issue, questions going to the extent and the consequences of such power do not. Otherwise stated, they contend that while there is substance in their present effort to enlarge the Hopi recovery, there is none in the Navajos' appeal that seeks to diminish the Hopi recovery.

In those circumstances we are necessarily constrained to point out that our earlier diagnosis of the Hopi fixation (J.S. 16)—"What is Hopi is mine, what is not Hopi is also mine"—has now been fully and indeed dramatically confirmed.

CONCLUSION

For the foregoing additional reasons, this Court should note probable jurisdiction of this appeal, as well as of the Hopis' cross-appeal in No. 1050.

Respectfully submitted.

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